IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

WILLARD UPHAUS,

Appellant

v.

LOUIS C. WYMAN, Attorney General,
State of New Hampshire,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT.

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

JURISDICTIONAL STATEMENT.

Appellant, Willard Uphaus, appeals from the judgment of the Supreme Court of New Hampshire entered on March [redacted], 1960, which sustained a Superior Court judgment of contempt committing him to jail for refusing to produce for appellee's inspection approximately 600 cards showing the names and addresses of persons who attended, during the years 1954 and 1955, a summer camp called "World Fellowship" of which appellant was the director.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinions Below.

The opinion of the Supreme Court of New Hampshire (R. 111) is reported in 102 N. H. 461, 159 A. 2d 160, and appears in Appendix A as rendered on March 31, 1960. A motion for bail was denied by that court on June 27, 1960, with an opinion (R. 197; not yet reported) which appears in Appendix B. There was no opinion in the Superior Court.

Jurisdiction.

On June 8, 1959, this Court held that appellee, by virtue of authority theretofore granted to him by the New Hampshire legislature and still in existence when the issues on that appeal were made up, had a right to compel disclosure of the names of all persons who attended the camp, for the purpose of ascertaining (and reporting to the legislature) "whether subversive persons • • • are presently located within this state". 360 U. S. 72.

On remand, appellant brought to the Superior Court's attention a supervening change in the New Hampshire statutes (effected after the filing of the original notice of appeal to this Court), greatly narrowing appellee's investigative authority. Although there precluded, by this Court's decision, from questioning appellee's *original* authority to demand the names, appellant contended on statutory and constitutional grounds that he could not *then* be committed to jail in a civil contempt proceeding designed to coerce the production of the information, the basis of such contention being that the legislature had terminated appellee's authority to make such an investigation on its behalf. The contention was rejected December 14, 1959, and a further demand was made on appellant

for production of the 600 cards bearing the names of the guests. As before, he refused to produce them on grounds of conscientious and religious scruple, saying (R. 13-15):

> "Your Honor, on January 5th [1956], I believe it was, in this court room, I said that there is no question in my life to which I have given more thought, more prayer, more consultation; no question in my life for which I have sought counsel more deeply and sincerely—religious counsel, legal counsel, the counsel of friends. Four years have transpired since that time. World Fellowship has had four successful seasons. It has brought many friendly people from different states in the United States, and from other countries in the world to Fellowship, to recreate in the pleasant environment, and to discuss the problems which mankind faces today. At no time did any guest at World Fellowship express or even suggest or intimate that there was the thought in their minds of subversion or of any organized effort to overthrow the State of New Hampshire or the United States. In fact, throughout each summer it was solely the welfare of this state, and of this nation and the people in the world, with which we were concerned.
>
> "Today, your Honor, the Bill of Rights is a part of my life—and I wish to uphold it. I today wish to uphold the Constitution of the State of New Hampshire, which says specifically that we are guaranteed the right of conscience. I am proud to uphold the Constitution of New Hampshire today. And, your Honor, I do not feel that in this instance what I regard as loyalty to God and to the Bible—*this abhorrence of bringing innocent people into public scorn and even possibly the loss of a livelihood*—I do not today regard this as out of relationship to my own loyalty to my country, and I stand solidly upon the Constitution of the United States and upon the Bill of Rights. I am strengthened by the opinion

of the minority of the United States Supreme Court which held that the investigation was held for the sake of exposure. I am helped by that finding when it says that I and World Fellowship have not violated constitutional law; that we were merely meeting there to discuss problems of economics, religion and society, so in this instance today my loyalty to God is not in contradiction with my loyalty to this state and this country, because I do not feel that I am standing against the law of my land. It is not defiance of the order of the Court; it is standing in the presence of history. It is standing in the presence of historical law; it is standing in the presence of moral law; it is standing in the presence of our heritage. I hope to see the day, your Honor, when the laws—either federal or state—that inquire into the thoughts of men and women and interfere with their free and peaceable assembly will be declared unconstitutional. I repeat that I stand upon the basic historic moral foundations of our democracy and of our country, and upon my conscience.

"Let me indicate that in addition to finding this strength in the minority opinion of the Supreme Court, I must indicate to you that what I do is not something—does not grow out of something that occurred to me yesterday or the day before or the first hearing of the Attorney General; it grows out of sixty-nine years of living; it grows out of the influence of a grandfather—a minister; it grows out of Christian parents; it grows out of a long, long life in the church, and it is in this tradition that I stand today—this tradition found in Judaism, in the early church, and at various times in the history of the people, that it is mean and contemptible to bring innocent people into public scorn and into possible loss of livelihood. This is seated deeply in the Old Testament. It is seated deeply in the early life of the church—and it appears again and again. My source is not only the Bible and what I know about religious history; my source today is the July, 1957 issue of Theology Today, in which Professor

George Williams, Professor of Church History at Harvard University, pointed out more clearly to me than I have ever seen before, that to bring innocent people into public scorn, into difficulty, into embarrassment, into the headlines of the papers, would be in violation of this great historic tradition.

"Your Honor, it is not my purpose here today to be defiant or to be stubborn, or to be contentious, or to put myself above the rulings of the courts. And I might remind you that the courts have changed their opinions over the years. It is not that. So therefore, your Honor, before God and before my friends here, I can do nothing else than to say no." (Emphasis added.)

The following order of committal was thereupon entered (R. 22):

"The rulings and findings of January 5th, 1956 are affirmed, thus ruling that Willard Uphaus is found and adjudged in contempt of this Court. Willard Uphaus is ordered committed to the Merrimack County Jail and there to remain for one year from this date or until he purges himself of contempt, or until further order of this Court."

Appellant excepted to this ruling and appealed to the New Hampshire Supreme Court. On March 31, 1960, that Court overruled his exceptions and affirmed the judgment and committal order of the Superior Court (R. 111). The notice of appeal was filed in the New Hampshire Supreme Court on June 20, 1960 (R. 183).

Motions for bail pending appeal were denied both by the Superior Court and by the New Hampshire Supreme Court, and appellant has remained in jail since December 14, 1959.

Jurisdiction of the appeal is conferred on this Court by 28 U. S. C. §§1257(2) and 2101(c). The following cases

sustain the jurisdiction of this Court: *Hamilton* v. *Regents of the University of California*, 293 U. S. 245 (1934); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Garner* v. *Los Angeles Board*, 341 U. S. 716 (1951); *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956); *Uphaus* v. *Wyman*, 360 U. S. 72 (1959).

Statutes Involved.

The validity of the following New Hampshire statutes (set forth in Appendix C) is involved:

(1) New Hampshire Laws, 1953, c. 307, approved June 17, 1953, granting appellee *temporary authority* to investigate and report to the legislature "with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state."

(2) New Hampshire Laws, 1955, c. 340, approved January 13, 1955, extending said authority to April 30, 1955.

(3) New Hampshire Laws, 1955, c. 197, approved June 14, 1955, extending said authority to June 30, 1957.

(4) New Hampshire Laws, 1957, c. 178, approved and effective June 14, 1957, granting appellee *permanent authority* to investigate and report to the legislature as to violations of the subversive activities act of 1951.

(5) New Hampshire Revised Statutes Annotated c. 491:19 and c. 491:20, authorizing the superior court to order the "production of things" upon petition of officials and boards who are empowered to take testimony but who are not empowered to "punish for contempt," the court being authorized "to proceed in the matter as though the

original proceeding had been in the court, and * * * make orders and impose penalties accordingly."

Questions Presented.

1. Whether a legislative demand for the public naming of hundreds of individuals, in a context which will inevitably result in their exposure to private retribution for exercise of the right of peaceable assembly, is forbidden by the due process clause of the Fourteenth Amendment and by the prohibition upon bills of attainder in Article I, Section 10 of the United States Constitution, in the absence of a concrete showing that identification of such persons can be expected to aid the legislative process.

2. Whether the due process clause of the Fourteenth Amendment forbids persistence in such legislative exposure after expiration of the temporary statute on which the demand for exposure was based.

3. Whether, in the absence of any showing of specific and compelling public need for such exposure, the due process clause of the Fourteenth Amendment forbids the imprisonment of a witness who refuses on grounds of religious and conscientious scruple to participate in the public identification of persons whose names the legislature seeks for the sole reason that they have accepted his invitation to a peaceable assembly.

Statement of the Case.

Appellee, acting as a one-man legislative "committee" pursuant to authority granted him by the New Hampshir legislature in 1953 and extended in 1955 by the new legislature which took office in that year, undertook an investigation of World Fellowship, a summer camp in New Hamp-

shire, of which appellant was the Director. In the course of that investigation appellee examined appellant at length in "Executive Session" hearings held in 1954 and 1955, on the subject of subversion or possible subversion. Appellant answered without reserve all questions about his own affiliations and actions and the activities at the camp. On grounds of conscience he refused to provide three categories of information: (1) the names of nonprofessional employees at the camp, such as cooks and cleaning women; (2) correspondence between appellant and persons who came to the camp as speakers; and (3) the names of all persons who attended the camp in 1954 and 1955—about 300 in each year. The state courts upheld appellant as to category (1), and there has been no final state court judgment as to category (2). This appeal, like the previous one, therefore concerns category (3) alone—the names of several hundred guests, which, for the reasons of conscientious and religious scruple stated above, appellant has refused and does refuse to produce.

The proceedings in the New Hampshire courts subsequent to this Court's decision on the prior appeal have been described above.

SUBSTANTIALITY OF THE QUESTIONS

I. The decision on the prior appeal, upholding the power of legislative exposure without a showing of specific legislative need, is erroneous and should be overruled.

We consider it our duty to request that the decision on the prior appeal be reconsidered and overruled. We are encouraged in this by Mr. Justice Frankfurter's wise reminder, in his dissent in *Harris* v. *United States*, 331 U. S. 145, 156 n.2 (1947), that "a constitutional adjudica-

tion of recent vintage and by a divided Court may always be reconsidered". See also *Kovacs* v. *Cooper*, 336 U. S. 77, 89 (1949) (concurring opinion). As will appear in Point II hereof, the present appeal raises new issues which would require reversal even if the prior decision were allowed to stand. But we respectfully submit that, unless and until it is overruled, it will constitute a present and continuing impairment of basic constitutional rights of the whole American people.

The broad issue in this case is whether the constitutional rights of free speech and peaceable assembly are to be reserved for heroes or whether they are to be available to all Americans—the timid as well as the brave. There are more ways than one of rendering speech and peaceable assembly extra-hazardous activities. The most direct and obvious way is to accept the doctrine of guilt by association, whereby criminal liability or civil disability can be imposed on a man simply because of the company he keeps. This Court having sternly and repeatedly declared that our Constitution forbids this particular means of discouraging group activity, we are now beset by a host of subtle stratagems directed to the same end but cloaked in ostensibly non-punitive form.

State officials tell us, for example, that the *names* of members of and contributors to the N. A. A. C. P. must be spread on the public records so that state regulation of foreign corporations and collection of municipal license taxes can be accomplished. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (1958); *Bates* v. *Little Rock*, 28 U. S. L. Week 4102 (1960). We are told that controversial handbills must carry the *names* of their printers and distributors so that circulation of obscene, libelous, fraudulent and otherwise objectionable printed matter can be prevented. *Talley* v. *California*, 28 U. S. L. Week 4186 (1960). And

in the present case we are told that the *names* of the several hundred people who attended a pacifist camp in 1954 and 1955 must be exposed to public view so that a sovereign state can enact statutes to protect itself from forcible overthrow. Always the *names*.

This Court has been quick to recognize the significance of this prepossession with public identification of individuals who have somehow had contact with persons or groups suspected of unpopular or unorthodox views on controversial subjects such as race relations and world peace. Such individuals cannot be convicted of crime without proof that they have done, or attempted, or conspired at, some illegal *act;* the Constitution forbids. The question is whether, in lieu of criminal punishment, they can be tagged with an inflammatory label—"subversive" or "integrationist"—and thus rendered visible targets, open to the fury of private zealots.

Such exposure is no less than a modern version of the pillory. Whether the state exposes a dissenter in the town square to be pelted with stones and taunted with epithets, or by scornful public identification exposes him to social ostracism, loss of employment, economic boycott, and general harrassment, the effect is to proclaim a general warning—a warning that participation in discussion and group action on the burning public issues of the day, far from being the free birthright of all Americans, is burdened with a heavy price. In a word, it is *punishment*.

Recent decisions have done much to dampen this new assault on those basic constitutional liberties which keep the government in its proper place as servant of the people rather than their master. With unanimous voice this Court has taken cognizance of the danger that the exposure technique may reduce the right of peaceable assembly and association to an empty form of words. After noting

that "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and after reviewing prior decisions protecting the rights of advocacy and association from indirect attrition, the Court laid bare the specific operation of the exposure technique in these words (*N. A. A. C. P.* v. *Alabama, supra,* 357 U. S. at p. 462):

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized *the vital relationship between freedom to associate and privacy in one's associations.* When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn.* v. *Douds, supra,* [339 U. S. 382] at 402: 'A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. *Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.*" (Emphasis added.)

Nor did the Court accept the pious disclaimer of state responsibility for the private vengeance made possible by official exposure. It declared (*id.*, p. 463):

> "It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in

> petitioner's activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."

The Court has had little difficulty in detecting and repelling unwarranted attacks on associational privacy under color of state law, where they have been made in a context which required the state to make explicit the nature of the public need on which the demand for exposure was based. In *N. A. A. C. P.* v. *Alabama*, *supra*, the demand was for discovery in a judicial proceeding, and the asserted public need could be measured against the issues framed by the pleadings. In *Bates* v. *Little Rock*, *supra*, the demand was made pursuant to tax ordinances which, by defining the purported public interest, made it possible to determine the presence or absence of a genuine need for publicity. In *Talley* v. *California*, *supra*, the demand was likewise embodied in an ordinance whose broad reach could be tested against the public interest which was claimed to justify it. And in all of these cases the demand for exposure was rejected on the ground that the defined public need could be satisfied by alternative means which would leave the right of associational privacy intact.

The sole deviation from this consistent pattern has occurred on the prior appeal of the present case, where the demand for exposure has been made in the course of a legislative investigation. Such investigations, by their very nature, are devoid of concrete issues. The need for exposure cannot be tested against a public need defined by judicial pleading or against a declared public policy defined by statute or ordinance, since the very purpose of a normal legislative investigation is to ascertain whether

and how the law should be changed. Therefore, when called upon to decide whether knowledge of the identity of the several hundred people who attended the World Fellowship camp in 1954 and 1955 was really needed by the New Hampshire legislature for lawmaking purposes, the Court had two alternatives. On the one hand, it could have held that since the legislature itself had failed to give a concrete explanation as to how the names might help it in its work, this missing link must be supplied by appellee at the bar of this Court. The other alternative, which the Court adopted, was to hold that the very formlessness of the legislative investigation makes it necessary to appraise the demanded exposure not in terms of its specific relationship to a defined public purpose, but in terms of the legislature's constitutional competence to enact laws in the general field being investigated. And, the Court being of the opinion that some residual state competence in the control of subversion has survived Federal pre-emption of the major aspects of this subject matter (*Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956)), it upheld the demand for exposure on the ground that there was some possibility of a "nexus between World Fellowship and subversive activities." The absence of any effort to show how the public naming of World Fellowship's guests could be useful to the legislature was deemed immaterial.

We respectfully submit that this softening of the standard which the Court has applied in other cases (before and since) for detecting and curbing the exposure technique, has opened a wide and potentially disastrous breach in our constitutional defenses against officially imposed orthodoxy. The scope and effect of the decision can perhaps be more fully appreciated if we see what it must mean to a man who takes seriously the admonition of Mr. Justice Brandeis (dissenting in *Gilbert* v. *Minnesota*, 254 U. S. 325, 337-338 (1920)):

> "The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the Government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it. Were this not so 'the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or duties of the national government' would be a right totally without substance. See *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Slaughter-House Cases*, 16 Wall. 36, 79. *Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the Nation than it is to himself.* Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril." (Emphasis added.)

Such a man is now put on notice that before he can safely participate in a wholly lawful discussion of such a vitally important subject as world peace, even at a privately operated summer camp, he must first obtain a full and accurate report of the organizational connections of all other participants in the proposed discussion. Even this is not enough. He must obtain similar information about everyone who has attended the camp in the past or may attend it in the future. If any of these people have ever been affiliated with organizations suspected of subversive tendencies, he runs the risk that the state legislature may *thereafter* elect to investigate some supposed threat to the security of the state and, in the course of such investigation,

proclaim him to the world as a "subversive person"—or perhaps, charitably, as one whose loyalty can neither be affirmed nor denied on the evidence at hand but who needs watching because of his unwise choice of associates.

It will be noted that the suffocating effect of the decision is not limited to New Hampshire. As we read the Court's opinion on the prior appeal, nothing now prevents *any* state legislature (or the Federal Congress, for that matter) from investigating and exposing past as well as future discussion groups—with no greater demonstration of public need than a hearsay "showing" of some ground for suspecting past or present subversive tendencies on the part of some one or more of those present.

We say that such an overhanging danger, even if it actually materializes only sporadically and in times of general anxiety and stress, is enough to discourage all but the most stout-hearted from full acceptance of their political responsibilities. There are nations where anyone who manifests an interest in public matters lays hold of a live wire, and must risk grave consequences if his views are out of harmony with the current official viewpoint. As a result, they are nations of sheep. We are now threatened with a similar prospect. Never since Mr. Justice Brandeis, concurring in *Whitney* v. *California*, 274 U. S. 357, 375 (1927), warned that "the greatest menace to freedom is an inert people", has the very basis of vigorous self-government been so deeply in jeopardy.

It will not do to say that associational privacy is an "individual" right which can weigh but lightly against the "governmental interest" in security against insurrection and invasion. To be sure, the right of privacy is ordinarily asserted by private individuals in litigation with public officials who speak in the name of the government. But those private individuals stand as defenders

of the sovereign status of the whole people. The constitutional protection is not invoked for the sole benefit of the particular party litigant. It is invoked in defense of the very shape of our society.

In order that the American people may remain masters of their government, we respectfully submit that the decision on the prior appeal should be reconsidered and overruled.

II. The declaration of legislative interest which was previously held to justify the demand for exposure has now been withdrawn.

While the majority opinion on the prior appeal dispensed with the necessity of a showing that exposure of the names could reasonably be expected to further the declared legislative purpose, it did at least make clear that the exposure was permitted solely because of the state legislature's declared desire to be informed as to whether "subversive persons" were then located in the state.

The opinion of the Court is quite clear on this point. It characterized the investigation as "an effort by the Legislature to inform itself of the presence of subversives within the State and possibly to enact laws in the subversive field." The central question was stated in the following terms:

> "The interest of the guests at World Fellowship in their associational privacy having been asserted, we have for decision the federal question of whether the public interests overbalance these conflicting private ones. Whether there was 'justification' for the production order turns on the 'substantiality' of New Hampshire's interests in obtaining the identity of the guests when weighed against the individual interests which the appellant asserts. *National Association for the Advancement of Colored People* v. *Alabama, supra.*

> "What was the interest of the State? *The Attorney General was commissioned to determine if there were any subversive persons within New Hampshire.* The obvious starting point of such an inquiry was to learn what persons were within the State. It is therefore clear that the requests relate directly to the Legislature's area of interest, *i.e.*, the *presence of subversives in the State,* as announced in its resolution." (Footnotes omitted; emphasis added.)

Again and again the opinion stresses the point that the demand for the names was being upheld because of the declared legislative interest in the presence of "subversive persons". Nowhere is it suggested that the investigation could be justified as a means of discovering *violations of law*—the other subject matter as to which the legislature, in its 1953 and 1955 statutes (which alone were then before the Court), had directed the attorney general to investigate and report.

Under Rule 10(2) of the Rules of this Court, the previous appeal was necessarily limited to the questions comprised in the notice of appeal. Said notice of appeal was filed April 26, 1957, and the case was briefed, argued and decided in terms of the New Hampshire statutes as they existed at that time. After the issues had thus been made up, however, the New Hampshire legislature materially narrowed the appellee's power to investigate on its behalf. Chapter 178 of the New Hampshire Laws of 1957 (approved June 14, 1957, and effective the same day) withdrew appellee's power to make investigations as to the *presence of subversive persons* within the state, and limited his inquiries to the subject of *violations of the sedition law*:

> "At any time when the attorney general has information which he deems reasonable or reliable relating to violations of the provisions of this chapter he

> shall make full and complete investigation thereof and shall report to the general court the results of this investigation, together with his recommendations, if any, for legislation."

It cannot be reasonably denied that the change was a material one. Chief Justice Warren, speaking for four members of this Court in *Sweezy* v. *New Hampshire*, 354 U. S. 234, 246-247 (1957), has analyzed the pre-1957 statutes and has taken note of the fact that the authority to ascertain the presence of subversive persons was far broader than the authority to investigate violations of law. He declared (and on this point no member of the Court disagreed with him):

> "The Attorney General was instructed by the legislature to look into violations of that Act. In addition, he was given *the far more sweeping mandate* to find out if there were subversive persons, as defined in that Act, present in New Hampshire" (Emphasis added.)

Two concrete examples may help to illuminate the Chief Justice's point. The term "subversive person," as defined in the statute, includes any member of a "subversive organization" (as defined)—regardless of whether the member has any knowledge of the organization's subversive purposes. Suppose a man joined one of the organizations (in New Hampshire or elsewhere) which appellee, in his 1955 Report to the New Hampshire Legislature, considered to be worthy of legislative attention—perhaps a Parent Teachers Association which had been "infiltrated" by the Communist Party (Report, p. 188). Suppose also that this man had no knowledge of the "infiltration" of the organization and simply joined in the naive belief that he owed it to his children to take this interest in the affairs of

their school. Suppose, further, that this man had then taken his family on a vacation trip to New England and, happening to reach the vicinity of Conway, New Hampshire, by nightfall, had seen the World Fellowship sign inviting his patronage and had put up for the night there, signing or having his name entered upon the usual guest registration card. Suppose, finally, that his only activity in the camp consisted of bedding his family down, getting a night's sleep and leaving at daybreak—all without reading anything or having any conversation with anyone except perhaps the registration clerk.

Under the legislation as it existed prior to June 14, 1957, the New Hampshire legislature must be assumed to have had an active interest in the presence of this man within the State. The actions described above did not, of course, constitute a violation of the New Hampshire sedition statute or of any other law, state or Federal. On the other hand, the legislature—until June 14, 1957—wanted to know the identity and whereabouts of such people, presumably on the premise that anyone who had come into contact with a seditious organization (however innocently) needed watching, and that the appellee should therefore ascertain the fact of his presence, report it to the legislature with a description of his affiliations, and—incidentally and regrettably but necessarily—identify him to the whole world as a "subversive person."

Consider a second example. World Fellowship is a place of public accommodation, advertising its facilities to the general public and offering lodging to anyone who wishes to sojourn in this attractive vacation area.* Suppose a man went there for a day or two simply for rest and

* Note the wording of its sign: "All races, colors, countries, convictions, welcome. $4 to $7 a day." Record on previous appeal, p. 70. It is entirely possible that some guests have put up at the camp solely because of the absence of racial restrictions encountered elsewhere.

recreation. Suppose further that he had no interest whatever in public affairs, never discussed them in his life, and never belonged to any organization except perhaps the Sons of the Revolution and the American Legion. Presumably appellee, upon learning these facts, would give him a clean bill of health. Yet, in view of appellee's insistence that the legislature had a right to know that New Hampshire is *not* infected with "subversive persons" (if that is the fact), as well as to know the contrary (see appellee's Brief on the previous appeal, p. 32), appellee could hardly refrain from making a public report detailing the above facts. The necessary consequence would be to inform the world at large that this man had spent part of his vacation at a camp operated by an organization which the New Hampshire Attorney General had declared to be subversive. It can hardly be assumed that no harm to the individual would result.

Considering the tremendous reach of such an investigation, and its obviously dangerous potentialities, it is understandable that the New Hampshire Legislature refrained from authorizing it except on a temporary basis—presumably to cope with some current emergency which was believed to exist. The temporary legislation enacted in 1953, authorizing the sweeping inquiry as to the presence of "subversive persons" within the state, was limited on its face to investigation "during this session of the 1953 legislature, recess and adjourned periods" (N. H. Laws of 1953, c. 307); and the 1955 extension of this authority continued only until June 30, 1957 (N. H. Laws of 1955, cc. 197, 340).

When the legislature finally enacted a permanent statute on the subject (N. H. Laws of 1957, c. 178) it terminated this broad authority. Whether it did this because the extraordinary power theretofore granted to the Attorney General was deemed too dangerous to be extended for the

indefinite future, or because of dissatisfaction with the manner in which the power had been exercised or with the paucity of legislative recommendations which had resulted from appellee's efforts, we cannot know with certainty. What we do know is that appellee's authority, as a "committee" of the legislature, to investigate the presence of subversive persons in New Hampshire, terminated in June, 1957.

It might have been supposed that appellee, who from the beginning has claimed investigatory power solely in the name of the legislature whose agent or delegate he is, would have recognized the narrowing of his authority and would have withdrawn his demand for the names. But upon remand of the case to the Superior Court after this Court's decision, he renewed that demand. Appellant immediately brought the new statutory situation to the Superior Court's attention and moved to dismiss the case as moot, claiming that enforcement of the demand at the sole instance of appellee, after termination of his legislative mandate to obtain it, would vest this single official with such broad and arbitrary power as to violate the due process clause of the Fourteenth Amendment (R. 8). Appellant's motion to dismiss was denied, however, and he was forthwith committed to jail.[4] The federal due process claim was preserved in appellant's exceptions and brief on appeal to the New Hampshire Supreme Court (R. 92) and was necessarily passed on and rejected by it.

The opinion of the New Hampshire Supreme Court affirming the judgment and order of committal (Appendix A) makes it quite clear that appellee's authority was deemed to flow from the state statutes. It refers to the 1957 statute as showing continuation of the legislative interest in "subversive *activities*"—as indeed it does—but ignored the plain and highly significant distinction between

engaging in a subversive *activity* and being a "subversive *person*" within the sweeping definition of the statute. The opinion, standing by itself, suggests that the commitment was being upheld under the 1957 statute though it does not expressly say so.

Appellant then moved for bail pending appeal to this Court, and shortly thereafter filed his notice of appeal (R. 117, 183). Both the motion and the notice made plain the entirely new questions presented by omission from the 1957 statute of the very provision which had served as the basis of this Court's decision. Finally, on June 27, 1960, the State Supreme Court rendered an opinion stating unequivocally that the commitment was based solely on the 1955 statute which was in effect when the Superior Court first ordered disclosure of the names (see Appendix B):

> "Our opinion of March 31, 1960, did not turn upon any holding that RSA 588:8a provided an extension of the legislative investigation first authorized in 1953. The plaintiff stands committed for refusal, while Laws 1955, *c.* 197 was still in effect, to comply with an order entered prior to enactment of RSA 588:8a."

For jurisdictional purposes it makes little difference whether the committal order and judgment be deemed to rest on the 1955 statute (as implemented by RSA 491:19 and 491:20, providing for judicial enforcement of the subpoenas) or the 1957 statute (as similarly implemented). In either event the validity of a state statute is "drawn in question • • • on the ground of its being repugnant to the Constitution • • • of the United States, and the decision is in favor of its validity." 28 U. S. C. §1257(2).

Whichever statute appellee may choose to rely on to support the commitment, it is plain that new and substantial Federal questions are presented. If he relies on the 1957 statute, he is faced with the impossible task of explaining how it would help him discover *violations of law* to learn the names of several hundred persons who, so far as the record shows, have done nothing to justify even the remotest suspicion that they have been a party to any act of a type which is or could constitutionally be made illegal. All that is known is that they had some undefined contact, five or six years ago, with a suspected organization. The New Hampshire legislature itself abandoned any interest it may have had in their particular identity, long prior to entry of the committal order and judgment now under review.

All the legislature requests, in the 1957 statute, is information as to violations of law. A search for such violations by obtaining the names in question would be a fishing expedition pure and simple. Nothing in this Court's decision on the prior appeal forecloses appellant's contention that a wholesale invasion of privacy for such a purpose, in the absence of any reason to think that illegal acts would thereby be uncovered, is a denial of due process of law.

Appellee's position is even weaker if he relies on the theory announced by the state Supreme Court in its opinion of June 27, 1960 (Appendix B), justifying the commitment on the sole ground that it was legal when originally entered on January 5, 1956, more than four and a half years ago. This must mean that the 1955 statute has been interpreted to vest appellee with an authority which outlasts his authority as an investigative agent for the legislature. And what can this be, except a power either to ferret out names for *his own* purposes (which this Court certainly has not held he can be lawfully authorized to do), or else to vindicate the authority of the 1955 legislature by persisting in an investigation which, having been stripped of

all remedial significance, can only be explained as a punitive measure (which this Court likewise has not sanctioned)?

One curious effect of reliance on the 1955 statute is to render the legislative interest immaterial except at the very outset of the investigation. In *Sweezy* v. *New Hampshire, supra*, four members of this Court held that the legislature had exceeded constitutional limits by abdicating its normal function of deciding whether particular items of information demanded by appellee on its behalf were really needed for its own purposes. In the view of these four Justices, the delegation of this function to appellee had the effect of relieving the legislature from public responsibility for exercise of the exposure power, and thus did away with a normal and essential safeguard against abuse.* But the proposed interpretation of the 1955 statute goes much farther. Not only does it relieve the legislature of the *duty* to supervise its agent's exercise of the broad and vaguely defined power it has vested in him; it eliminates the legislature's *power* to do so.

A brief recapitulation of the actual sequence of events in this case will show how completely the legislature has been deprived of control of its own investigations. In 1955 it continued, until the middle of 1957, the general investigatory authority initially granted to appellee in 1953. Pursuant to this authority appellee examined appellant in "Executive Session"—private proceedings which the legislature could not have supervised even if it had been sitting at the time, which it was not. Appellee then went to court and on January 5, 1956, obtained an order for disclosure of the names. At that moment the legislative mandate dropped out of the picture. All that mattered from then on was the court order.

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* It may be noted that no witness can be proceeded against for contempt of either house of Congress, either criminally under 2 U. S. C. §192 or by direct civil process, without approval of the house itself (or its presiding officer acting on its behalf).

The New Hampshire legislature is not a continuing body; it is wholly reconstituted every two years, all members of the Senate as well as the House of Representatives being elected biennially. New Hampshire Constitution, Part 2, Articles 9 and 25. The authority granted by the vanished legislature of 1955 was necessary to enable appellee to bring this case before the Superior Court, but at that point its power to direct and control the investigation terminated. The logical consequence of the New Hampshire Supreme Court's opinion of June 27, 1960 (Appendix B) is that by virtue of the 1955 statute appellee could persist in the effort to expose World Fellowship's guests, with the coercive aid of the Superior Court, even if the present legislature were to declare itself wholly uninterested in his efforts and were to terminate his investigatory power entirely.

A more complete diffusion of public responsibility can hardly be imagined. Appellee, if criticized for the wanton invasion of associational privacy which has occasioned appellant's commitment, can say (and consistently has said) that he seeks the names not for himself but for the legislature, and that it is not he but the Superior Court Judge who decides the nature and severity of coercive orders in aid of the investigation. That Judge, if asked how exposure of the names can serve a public purpose, can simply reply that this is the legislature's problem, not his. And the legislature, if asked the same question, not only can disclaim responsibility for initiating the demand for the names (inasmuch as the matter was taken to court long before the present legislature came into being), but also can deny its own power to limit or stop any aspect of the investigation which has reached the stage of a judicial compliance order. All possibility that abuses of power might be checked by an aroused public opinion

thus disappears entirely. The compliance order has become a blind Juggernaut, set in motion by the departed 1955 legislature but rolling now by its own momentum, uncontrollable by the present legislature.

But, it will be said, appellant cannot be permitted to flout the authority of the Superior Court and then go unscathed simply because, during the years consumed in litigation, an originally valid compliance order has now ceased to serve any lawful purpose. Such a view would have weight if this were a criminal contempt proceeding. It is by such proceedings that courts vindicate their dignity and protect their authority. Appellant's commitment, however, is based on a civil contempt order; and such an order, by definition, is made for the benefit of a contending litigant—as a means of obtaining specific enforcement of some right possessed by him—rather than for the benefit of the court. That is what "civil" means. As was said in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441-443 (1911):

> "Contempts are neither wholly civil nor altogether criminal. • • • It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.
>
> • • • • • •
>
> "The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant.
>
> • • • • • •
>
> "It is true that either form of imprisonment has also an incidental effect. For if the case is civil

> and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*."

See also *Penfield Co.* v. *S. E. C.*, 330 U. S. 585, 590 (1947):

> "Where a fine or imprisonment imposed on the contemnor is 'intended to be remedial by coercing the defendant to do what he had refused to do,' *Gompers* v. *Bucks Stove & Range Co., supra*, p. 442, the remedy is one for civil contempt. *United States* v. *United Mine Workers*, 330 U. S. pp. 258, 303. Then 'the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public.' *McCrone* v. *United States*, 307 U. S. 61, 64."

There is a tendency to think of a conditional civil contempt order as a milder exercise of official power than an unconditional punishment for criminal contempt, because the defendant can always escape the force of the order by complying with it. That is what makes tolerable the omission, from civil contempt proceedings, of many of the procedural safeguards with which criminal proceedings are hedged about, including the necessity of adjudicating the punishment once and for all rather than retaining jurisdiction to alter or extend the imprisonment from time to time. (Compare *In re Bradley*, 318 U. S. 50 (1943).)

But the civil contempt power can in some cases bear upon a defendant even more heavily than its criminal

counterpart; and it has an inherent limitation of its own which serves to minimize the harm that might otherwise result from its abuse. Since the power exists only for the purpose of enabling the court to help a party litigant get his legal rights, it terminates when—by lapse of time or otherwise—those rights disappear. Thus, in *Gompers* v. *Bucks Stove & Range Co., supra,* a civil contempt commitment for disobedience of a labor injunction was set aside because the main injunction suit had come to an end, the Court saying (221 U. S. at p. 451):

> "But the very amplitude of the [civil contempt] power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper.
>
> • • • • • •
>
> "When the main case was settled, every proceeding which was dependent on it, or part of it, was also necessarily settled—of course without prejudice to the power and right of the court to punish for contempt by proper proceedings. *Worden* v. *Searls,* 121 U. S. 27."

In the field of legislative investigations, this principle has the effect of disabling the legislature to continue a civil contempt commitment after the end of the session during which the commitment takes place. *Anderson* v. *Dunn,* 6 Wheat. 204, 230-231 (1821):

> "The present question is, what is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation?
>
> "Analogy, and the nature of the case, furnish the answer:
>
> " 'The least possible power adequate to the end proposed;' which is the power of imprisonment. • • • And even to the duration of imprisonment a

> period is imposed by the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment."

An exception has been recognized in the case of *continuing* legislative bodies such as the United States Senate. *McGrain* v. *Daugherty*, 273 U. S. 135, 181 (1927). But, as noted above, the New Hampshire legislature is not such a body.

Nor is the limitation avoided by the fact that the state legislature has enlisted the aid of the Superior Court in enforcing compliance with its subpoenas. When the court so acts in aid of a purely legislative investigation it exercises legislative power, and the constitutionality of its acts must be appraised on that basis. See *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226 (1908), where the Court (per Holmes, J.) said:

> "Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. §720, no matter what may be the general or dominant character of the body in which they may take place. *Southern Ry. Co.* v. *Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, 94, affirmed *sub nom. McNeill* v. *Southern Ry. Co.*, 202 U. S. 543. That question depends not upon the character of the body but upon the character of the proceedings. *Ex parte Virginia*, 100 U. S. 339, 348."

We respectfully submit that the due process clause forbids the continuation of a commitment for civil contempt, in a floating status, after the substantive proceeding to which it was ancillary has disappeared or has ceased to have lawful justification. Were the law otherwise, a recalcitrant witness in a civil or criminal litigation could

be imprisoned for life even though the case itself had long since been settled or decided.

Imprisonment cannot constitutionally be inflicted unless it has an appropriate relationship to the effectuation of some public purpose. Whether or not it was reasonable, as an initial proposition, to suppose that appellant's conscientious principles could and would be broken by imprisonment, and that the desired information could thus be obtained, there is certainly no basis for continuing the coercive effort after the asserted legislative need for the information has come to an end.

III. Imprisonment for fidelity to conscientious and religious scruple, without a showing of compelling public need, is a cruel and unusual punishment.

Even if the Court were to be of the opinion that the Constitution does not forbid appellee, as agent of the New Hampshire legislature, from publicizing the names of persons whom he considers to be dangerous by reason of their associations, it does not follow that appellant can rightly be compelled to become his partner in the deed. Whether the exposure of these people is desired for punitive purposes or not, no one denies that it will hurt them. And appellant asserts a religious and conscientious scruple against becoming an instrument to that end. The question is whether the state's interest in obtaining the names is sufficiently substantial to justify the overriding of this scruple.

Consider what appellant is called upon to do. As director of the camp he issued a general invitation to people of all races and persuasions to come there for discussion of a pressing public problem. Although he had a constitutional right to invite them, and they had a constitutional right to come, it now appears that he has thereby jeopardized their safety.

There is no reason to doubt the sincerity of appellant's conviction that disclosure of the names would be a breach of religious obligation. But even apart from the requirements of religion there is a moral obligation to protect those whom one has placed in a position of peril. We suggest that the Court itself has felt the force of this obligation when called upon to defend those pursued by the state because of their reliance on the school segregation decision. *N. A. A. C. P.* v. *Alabama* and *Bates* v. *Little Rock, supra.* Recognition of such an obligation is manful and right.

We are not now dealing with a situation where the public authorities have reason to believe that some act has been committed which is or could be made unlawful, and are seeking to confirm or deny that belief. The state hungers after the names of these guests only because of their contact with appellant and the camp. In such circumstances the cruelty and arbitrariness of compelling the disclosure is particularly clear.

Coercive imprisonment of the conscientiously objecting witness either will achieve its purpose or it will not. If it does, he is punished for having exercised his constitutional right of peaceable assembly, the substance of the punishment being the knowledge that he has helped to harm innocent people whom he had a moral obligation to protect—a knowledge he will have to live with for the rest of his days. The surer he is that the assembly was innocent, the greater his shame at exposing its participants. The severity of his punishment is thus inversely related to the public benefit which might result from the disclosure. The emptier the public need, the harsher the sanction.

If the witness elects to follow the dictates of his conscience—and history shows that men have gladly gone to the stake rather than yield their convictions—he is jailed. His imprisonment serves no public purpose, for the coercive aim is not achieved. The only effect is to punish him for

faithful adherence to the requirements of morality as he understands them.

For more than eight months now, appellant has been held in close indoor confinement in the Merrimack County Jail—a much more severe hardship, incidentally, than would result from a like term in a penal institution, where exercise, sunlight, companionship and a job are ordinarily allowed even to hardened inmates. We say that to keep a man in jail for a year in the obviously vain hope that he may thereby be induced to abandon his principles is *punishment* whether or not it is called by that name, because it cannot reasonably be expected to serve any non-punitive objective. We say that such punishment is *cruel* because it is grotesquely disproportionate to any public harm which may be thought to have resulted from refusal of the names. And we say that it is *unusual* for the simple reason that, so far as we can discover, there is no modern precedent for the infliction of so severe a penalty upon fidelity to religious and conscientious principle. Appellant's confinement has already lasted longer than the seven months which this Court recently held to be the maximum reasonable commitment in a similar case. *Yates* v. *United States*, 356 U. S. 363 (1958).

The decision of this Court on the prior appeal cannot rightly be regarded as foreclosing the claim of cruel and unusual punishment which is raised on the present record. It is contrary to common sense and history to suppose that conscientious scruples, sincerely held, will yield to jail or the threat of jail. This Court therefore may well have assumed that, upon remand, the Superior Court would limit the commitment to a term sufficient to convince it of the futility of further imprisonment as a coercive device in this case. Instead, it has committed appellant to jail for a period of a full year—even if we ignore appellee's claim that the commitment order leaves open the possibility of *indefinite* extension (R. 153-155).

But if the decision on the prior appeal means that a conscientiously objecting witness can be imprisoned for punitive purposes even after it has become clear that the coercive purpose cannot be achieved, we respectfully submit that it is erroneous and should be limited or overruled.

The underlying principle involved in this case is the same as in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943), overruling *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940). In the *Barnette* and *Gobitis* cases the issue was whether an affirmative act—the flag salute—could be constitutionally required of children asserting a conscientious scruple against that particular physical act. Here the question is whether the production of a list of names can be constitutionally required of a witness asserting conscientious scruples against that particular disclosure. But the difference is superficial; for in both the asserted justification for the requirement was the safety of the state, the basic question being the permissibility of achieving that end by overriding of the scruples of the individual citizen.

In the *Gobitis* case (decided on June 3, 1940, in the midst of the tension caused by the imminent fall of France and all it implied) this Court, by a vote of eight to one, found adequate justification for subordinating the rights of the individual. But it is noteworthy and to the eternal credit of our institutions that on June 14, 1943, on "long reflection" (as two of the Justices who changed their opinion put it), this Court acknowledged the unsoundness of the *Gobitis* decision and by a vote of six to three flatly overruled it. By so doing who can now doubt that this Court rendered a service to the cause of liberty?

If in the *Barnette* case, decided in the midst of serious war, this Court considered that in requiring the flag salute from conscientious objectors, state authority had over-

stepped constitutional bounds, we ask: Upon what reasonable grounds can it be held constitutional in 1960 to punish a conscientious objector who has done no more than decline to disclose a list of guests against whom no charge has been brought or any real ground for suspicion shown?

On this branch of the argument of this appeal, we shall wish to invite the close attention of this Court to the current case of Dr. Linus Pauling, as illustrative of the evils which will gather around us unless some weight is given to the claim of conscience under such circumstances as are presented here. In respect of the constitutional issue involved, the *Pauling* case appears to be on all fours with this one, if it be assumed, as we do, that a state can constitutionally go no further than the Federal Government in trying to extract from a witness information which he refuses to disclose upon grounds of conscience.

Dr. Pauling is an eminent chemist who was awarded the Nobel Prize in chemistry in 1954 and who, believing that continuance of nuclear weapons tests would be dangerous to mankind, undertook to marshal the expressed opinion of scientists from many nations against such continuance. To do so he circulated a petition and for this purpose solicited the active aid of a considerable number of scientists in the United States. His efforts were successful, resulting in the signature by over 11,000 scientists from 49 countries of a petition, filed with the United Nations, against a continuance of the tests.*

On June 18, 1960 Dr. Pauling was served with a subpoena to testify before the Senate Internal Security Subcommittee. Pursuant to this subpoena Dr. Pauling appeared before the subcommittee on June 21, 1960, when he was

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* The facts of the *Pauling* case are taken from the New York Times of June 22, 1960, §1, pp. 1 and 14, and from the complaint in *Pauling* v. *Eastland*, filed August 4, 1960, in the United States District Court for the District of Columbia.

asked to produce the names of all the approximately 2,000 American scientists who signed the petition, the names of those to whom he had written asking assistance in his petition campaign, and the names of those who had circulated petitions. The ostensible reason given for these inquiries was to seek information as to possible "communist participation in, or support of a propaganda campaign against nuclear testing."

In reply to these inquiries, Dr. Pauling offered to supply the subcommittee with the names of the approximately 2,000 American scientists who had signed the petition (those names having previously been made public and being on file with the United Nations), and also to give the subcommittee the names of those to whom he had written to ask assistance "because," as he said, "people are not responsible for the mail they receive. The responsibility for sending out the letter is mine." But Dr. Pauling refused to comply with the demand for the names of those who had assisted him in circulating the petition, stating that this refusal was based upon "conscience, morality and justice," and that "no matter what assurances the subcommittee might give me, I am convinced that these names would be used for reprisals against idealistic, high-minded workers for peace."

This refusal was not accepted by the subcommittee, which directed Dr. Pauling to return before the subcommittee at a later date and then to supply the withheld information. If he persists in his refusal, the Senate will presumably imprison him by its own process or refer the case to the Department of Justice for criminal proceedings under 2 U. S. C. §192.

Dr. Pauling, like Dr. Uphaus, has been willing to testify freely as to his own acts and beliefs but has refused on

conscientious grounds to participate in the harmful exposure of people charged with no wrongdoing, who had by his invitation placed themselves in a position of peril. If the Cold War continues and intensifies it can be expected that similar demands for names will be made by zealous investigators, whether with good or bad motives, and that the names will be refused on the same conscientious grounds. Unless some constitutional barrier is erected to protect the right of associational privacy in this circumscribed but important area, quite a number of our most conscientious and distinguished citizens may soon be in confinement—or (and this could be still more dangerous from the public viewpoint) may withdraw from the arena of public affairs where their talents are so sorely needed.

Much is now being said as to the importance for our future of the "image" of the United States held by other peoples. This matter is properly stressed, since in the longer view and in the judgment of some of our wisest men and women, more may ultimately depend upon the impression that we make upon the rest of the world in respect of our genuine devotion to free institutions, than on additions to our stockpiles of nuclear weapons which are probably now sufficient virtually to destroy all human life. We hurt ourselves and dim the hopes of the whole world if we give the authoritarian countries a basis for deriding as empty words our professions of freedom and of respect for the individual conscience.

Conclusion.

The questions involved in this case are substantial and important. Fundamentally, the issue is whether government by the people will remain a living reality. The Court should take this opportunity to reaffirm and implement the ringing words spoken in its name by Mr. Justice Jackson

in *West Virginia State Board of Education* v. *Barnette*, *supra* (319 U. S. at p. 641):

> "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."

Respectfully submitted,

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Appendix A.

Opinion of the Supreme Court of New Hampshire, March 31, 1960.

Merrimack,
No. 4829.

LOUIS C. WYMAN, *Attorney General*

v.

WILLARD UPHAUS.

Argued March 1, 1960.

Decided March 31, 1960.

PETITION, by the Attorney General under RSA 491:19, 20 for an order to compel compliance by the defendant with two subpoenas *duces tecum* served upon him in the course of a legislative investigation of subversive activities conducted by the Attorney General pursuant to resolutions appearing in Laws 1953, *c.* 307 and Laws 1955, *c.* 197.

The petition was originally heard on January 5, 1956, when the defendant was ordered to produce guest registrations at the New Hampshire World Fellowship Center at Albany, New Hampshire, for the 1954 and 1955 seasons. This was part of the information sought by the above-mentioned subpoenas. Upon his refusal to comply with this order he was found and adjudged in contempt and ordered committed until he should purge himself of his contempt. Pending transfer of his exceptions defendant was admitted to bail.

The defendant's exception to the above order was overruled by this court (*Wyman* v. *Uphaus*, 100 N. H. 436, 445) and the order of committal was held valid by the United

States Supreme Court. *Uphaus* v. *Wyman*, 360 U. S. 72. Thereafter a further hearing on this matter was held on December 14, 1959 before GRANT, J. who presided at the previous hearing. Defendant objected to the jurisdiction of the Court on statutory and constitutional grounds and made a motion to dismiss which was denied. At the conclusion of the hearing the Court made the following order: "The rulings and findings of January 5th, 1956 are affirmed, thus ruling that Willard Uphaus is found and adjudged in contempt of this Court. Willard Uphaus is ordered committed to the Merrimack County Jail and there to remain for one year from this date or until he purges himself of contempt, or until further order of Court."

The defendant's exception to the order of the Court was reserved and transferred.

LOUIS C. WYMAN, Attorney General (by brief and orally), *pro se*.

NIGHSWANDER, LORD & BOWNES and ROYAL W. FRANCE (of N. Y.) (MR. BOWNES orally), for the defendant.

JAMES C. CLEVELAND and HOWARD S. WHITESIDE (of Massachusetts) (MR. WHITESIDE orally) for Hugo DeGregory, *amicus curiae*.

WHEELER, J. The chief contention of the defendant is that the Superior Court was without jurisdiction to find him in contempt because the statute authorizing the investigation expired on June 30, 1957 by express provision of chapter 197, Laws 1955.

In determining the validity of this argument it is necessary to examine the legislative history in the field of subversive activities in order to ascertain the legislative intent with respect to investigations by the Attorney General.

In 1951 the Legislature enacted "An act relating to subversive activities," taking cognizance of a "World Communist movement under the domination of a foreign power" which by its methods "including treachery and

deceit, [infiltrates] into governmental and other institutions." Laws 1951, *c.* 193 (now RSA ch. 588).

In 1953 the Legislature adopted a joint resolution authorizing and directing the Attorney General "to make full and complete investigation with respect to violation of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state." Laws 1953, *c.* 307. This investigation was further extended on two occasions, the last enactment continuing it to June 30, 1957. Laws 1955, *c.* 197, and *c.* 340.

In 1957 the Legislature amended the original act of 1951 by enacting chapter 178 "An act relative to investigation of subversive activities," which among other changes inserted after RSA 588:8 the following new section: "588:8a Attorney General. At any time when the attorney general has information which he deems reasonable or reliable relating to violations of the provisions of this chapter he shall make full and complete investigation thereof and shall report to the general court the results of this investigation, together with his recommendations, if any, for legislation. In any investigation hereunder the attorney general or any duly authorized member of his staff is authorized to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers and documents and to administer such oaths, and to take such testimony and to make such expenditures within the funds provided as he deems advisable. The provisions of section 7 of this chapter shall be inapplicable to the investigation provided for herein and the attorney general is hereby authorized to make public such information received by him, testimony given before him, and matters handled by him as he deems fit to effectuate the purposes hereof."

The Legislature was then aware that the temporary legislation (chapter 307, Laws 1953) as extended would expire within two weeks and was presumably aware that the defendant's appeal was then pending. Neither the

statute which expired nor the 1957 statute just quoted contains any provision which would indicate that expiration should terminate pending proceedings. *Opinion of the Justices,* 89 N. H. 563, 565. See also, RSA 21:37 and *Lakeman* v. *Moore,* 32 N. H. 410. The series of statutory enactments on the subject of subversive activities indicates the legislative purpose to continue the Attorney General's authority to investigate subversive activities and not end it when his power expired under chapter 197, Laws 1955. No clearer indication of this is needed than the enactment of chapter 178, Laws 1957, effective June 14, 1957, establishing a permanent authority in the Attorney General two weeks before the date of expiration of his temporary authority. The Legislature has thus shown a live and continuous interest in this subject matter. The jurisdiction of the Trial Court under RSA 491:19, 20 to enter the committal order in this case remains unimpaired. *Opinion of the Justices, supra.*

The constitutionality of the act under which the State proceeded against the defendant (Const. Pt. I, *Art.* 37th) has heretofore been decided and no reason is presented sufficient to warrant re-examination of the subject. See *Nelson* v. *Wyman,* 99 N. H. 33.

Exceptions overruled: judgment and committal order affirmed.

All concurred.

Appendix B.

Opinion of the Supreme Court of New Hampshire, June 27, 1960.

Merrimack,
No. 4829.

WILLARD UPHAUS *v.* LOUIS C. WYMAN, *Attorney General*

Argued June 8, 1960.

Decided June 27, 1960.

MOTION, by the plaintiff seeking suspension of an order of the Superior Court entered on December 14, 1959, and affirmed by this court on March 31, 1960, committing him to jail for contempt, and for a further order that he be admitted to bail, pending application to the United States Supreme Court for review of the judgment of this court entered on March 31, 1960.

ORR & RENO, HUGH H. BOWNES, ROYAL W. FRANCE and LEONARD B. BOUTIN (both of New York) and LOUIS LUSKY and MARVIN H. MORSE (both of Kentucky) (MR. RENO orally), for the motion.

LOUIS C. WYMAN, Attorney General (by brief and orally), opposed.

PER CURIAM. The plaintiff's motion alleges that he now proposes to seek review by the United States Supreme Court of the decision of this court handed down on March 31, 1960. *Wyman* v. *Uphaus,* 102 N. H. 461; 159 A. (2d) 160. It indicates that one basis for the review to be sought arises out of the expiration on June 30, 1957 of the legislation which directed the Attorney General "to determine whether subversive persons . . . are presently located within this state" (Laws 1953, *c.* 307; Laws 1955, *cc.* 197,

340), and the alleged imposition of limitations upon the previous authority of the Attorney General by the enactment on June 14, 1957 of RSA 588:8a. Laws 1957, *c.* 178. We are urged to suspend the order of committal entered on December 14, 1959, so that review may be had before committal shall end.

The statutory changes thus relied upon occurred before this case was remanded to this court following vacation of its earlier judgment by the United States Supreme Court on October 14, 1957. *Uphaus* v. *Wyman*, 355 U. S. 16. In November 1957, the plaintiff, in this court, opposed reinstatement of the judgment (*Wyman* v. *Uphaus*, 101 N. H. 139), and in November 1958, before the United States Supreme Court, argued his appeal from the reinstated judgment which was affirmed on June 8, 1959. *Uphaus* v. *Wyman*, 360 U. S. 72.

Our opinion of March 31, 1960, did not turn upon any holding that RSA 588:8a provided an extension of the legislative investigation first authorized in 1953. The plaintiff stands committed for refusal, while Laws 1955, *c.* 197 was still in effect, to comply with an order entered prior to enactment of RSA 588:8a.

Between January 5, 1956 and December 14, 1959, the plaintiff was at large upon bail. See *Wyman* v. *Uphaus*, 100 N. H. 436, 438. Yet the issues relied upon to support the review now to be sought although available to the plaintiff after June 1957, were not presented in the pending proceedings at any time, until first advanced before the Superior Court on December 14, 1959, the day on which the order of committal was entered. Other issues presented by the motion have been briefed and argued many times by competent counsel who have ably protected the plaintiff's rights.

This case has been repeatedly before the courts of this state and the United States Supreme Court, since 1954. See *Wyman* v. *Uphaus*, 100 N. H. 1; *Wyman* v. *Uphaus*, 100 N. H. 436; *Uphaus* v. *Wyman*, 355 U. S. 16; *Uphaus* v. *Wyman*, 356 U. S. 925, 965; *Wyman* v. *Uphaus*, 101 N. H. 139; *Uphaus* v. *Wyman*, 360 U. S. 72; *Wyman* v. *Uphaus*,

102 N. H. 324; *Wyman* v. *Uphaus*, 102 N. H. 461, 159 A. (2d) 160.

An examination of the pending motion in the light of the entire history of the case convinces us that there is no occasion to grant the relief sought.

Motion denied.

Appendix C.

New Hampshire Laws, 1953.

CHAPTER 307.

JOINT RESOLUTION RELATING TO THE INVESTIGATION OF SUBVERSIVE ACTIVITIES.

Resolved by the Senate and House of Representatives in General Court convened:

That the attorney general is hereby authorized and directed to make full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state. The attorney general is authorized to act upon his own motion and upon such information as in his judgment may be reasonable or reliable. He may authorize any member of his staff to conduct on his behalf any part of the investigation herein provided for and in such event and for such purposes any member so authorized shall have all of the powers herein granted to the attorney general.

For the purposes of this resolution, the attorney general or any duly authorized member of his staff is authorized to sit and act at such times and places during this session of the 1953 legislature, recess and adjourned periods, and to employ such attorneys, experts, clerical and other assistance as may be required, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, and to administer such oaths, to take such testimony and to make such expenditures within the limitations authorized herein as he deems advisable. The provisions of section 7 of chapter 193 of the Laws of 1951 shall be inapplicable to the investigation provided for herein, and the attorney general is hereby authorized to make public such information received by him, testimony given before him, and matters handled by him as he deems fit to effectuate the purposes of this resolution.

The attorney general is directed to proceed with criminal prosecutions under the subversive activities act whenever evidence presented to him in the course of the investigation indicates violations thereof, and he shall report to the 1955 session on the first day of its regular session the results of this investigation, together with his recommendations, if any, for necessary legislation. There is hereby appropriated for the expenses of this investigation the sum of ten thousand dollars which shall include the cost of printing such report as is provided for by this resolution and shall be expended under the direction of the attorney general, but nothing herein contained shall limit the power of the attorney general to act in cases of reasonable necessity under the provisions of section 11 of chapter 24 of the Revised Laws. The governor is hereby authorized to draw his warrants for the sum hereby appropriated out of any money in the treasury not otherwise appropirated.

[Approved June 17, 1953.]

New Hampshire Laws, 1955.

CHAPTER 340.

JOINT RESOLUTION RELATIVE TO CONTINUED DUTIES OF THE ATTORNEY GENERAL.

Resolved by the Senate and House of Representatives in General Court convened:

THAT the attorney general is hereby authorized and directed to continue the investigation authorized by chapter 307 of the Laws of 1953 in form, manner and authority as therein provided for the period from January 1, 1955 to April 30, 1955, and for the purposes hereof the provisions of said chapter 307, except as otherwise herein provided, are hereby continued in full force and effect for the additional period herein mentioned.

[Approved January 13, 1955.]

CHAPTER 197.

AN ACT RELATIVE TO INVESTIGATION OF SUBVERSIVE ACTIVITIES.

Be it enacted by the Senate and House of Representatives in General Court convened:

1. *Subversive Investigation.* The investigation of subversive activities by the attorney general provided for by chapter 307 of the Laws of 1953, as continued by a resolution approved January 13, 1955, is hereby continued in full force and effect, in form, manner and authority as therein provided for the further period until June 30, 1957. The attorney general shall report to the general court of 1957 the results of this further investigation together with his recommendations, if any, for necessary legislation. He may at any time during said period temporarily or permanently conclude his investigation hereunder if, in his opinion, no useful public purpose would be served by continuation of the investigation. There is hereby appropriated for the expenses of this continued investigation a sum not to exceed forty-two thousand five hundred dollars, which shall include the cost of printing such report as is provided for hereby, but nothing herein contained shall limit the power of the attorney general to act in cases of reasonable necessity under the provisions of section 11 of chapter 24 of the Revised Laws (section 12, chapter 7, RSA). The governor is hereby authorized to draw his warrants for the sum hereby appropriated out of any money in the treasury not otherwise appropriated.

2. *Takes Effect.* This act shall take effect upon its passage.

[Approved June 14, 1955.]

CHAPTER 178.

AN ACT RELATIVE TO INVESTIGATION OF SUBVERSIVE ACTIVITIES.

Be it enacted by the Senate and House of Representatives in General Court convened:

178:1 *Subversive Activities.* Amend RSA 588:8 by striking out said section and inserting in place thereof the following: *5:88 Grand Jury Inquiries.* The superior court, when in its discretion it appears appropriate, or when informed by the attorney general that there is information or evidence of the character described in section 2 of this chapter to be considered by the grand jury, shall charge the grand jury to inquire into violations of this chapter for the purpose of proper action.

178:2 *Investigations.* Amend RSA 588 by inserting after section 8 the following new section: *588:8-a. Attorney General.* At any time when the attorney general has information which he deems reasonable or reliable relating to violations of the provisions of this chapter he shall make full and complete investigation thereof and shall report to the general court the results of this investigation, together with his recommendations, if any, for legislation. In any investigation hereunder the attorney general or any duly authorized member of his staff is authorized to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers and documents and to administer such oaths, and to take such testimony and to make such expenditures within the funds provided as he deems advisable. The provisions of section 7 of this chapter shall be inapplicable to the investigation provided for herein and the attorney general is hereby authorized to make public such information received by him, testimony given before him, and matters handled by him as he deems fit to effectuate the purposes hereof.

178:3 *Appropriation Extended.* Any balance of the funds provided by 1955, 197:1 shall not lapse, but shall be a continuing appropriation for the use of the attorney general in any investigation under RSA 588:8-a

178:4 *Takes Effect.* This act shall take effect upon its passage.

[Approved June 14, 1957.]

[Effective date June 14, 1957.]

New Hampshire Revised Statutes Annotated.

PROCEEDINGS FOR CONTEMPTS BEFORE OTHER BODIES.

491:19 *Petition.* Whenever any official or board is given the power to summon witnesses and take testimony, but has not the power to punish for contempt, and any witness refuses to obey such summons, either as to his appearance or as to the production of things specified in the summons, or refuses to testify or to answer any question, a petition for an order to compel him to testify or his compliance with the summons may be filed in the superior court, or with some justice thereof.

491:20 *Procedure.* Upon such petition the court or justice shall have authority to proceed in the matter as though the original proceeding had been in the court, and may make orders and impose penalties accordingly.

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM 1960

No. 336

WILLARD UPHAUS

v.

THE STATE OF NEW HAMPSHIRE

On Appeal from The Supreme Court of The State of New Hampshire

MOTION TO DISMISS

THE STATE OF NEW HAMPSHIRE

BY: LOUIS C. WYMAN, Attorney General

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SUPREME COURT OF THE UNITED STATES

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On Appeal from The Supreme Court of The State of New Hampshire

---

MOTION TO DISMISS

THE STATE OF NEW HAMPSHIRE

BY: LOUIS C. WYMAN, Attorney General

PRELIMINARY STATEMENT

Appellee, The State of New Hampshire, by Louis C. Wyman, Attorney General, in conformity with Rule 16 of this Honorable Court, respectfully submits the following Motion to Dismiss the appeal of Willard Uphaus, Appellant, on the grounds specified in said Motion.

MOTION TO DISMISS

I. No substantial Federal question is involved.

Now comes the Appellee, The State of New Hampshire, by Louis C. Wyman, Attorney General, and respectfully moves that the appeal of Willard Uphaus, Appellant, as more particularly described in the Jurisdictional Statement filed by Appellant with this Honorable Court be dismissed on the ground that no substantial Federal question is involved.

The use of the contempt power of the New Hampshire Superior Court for Merrimack County in order to compel compliance by a witness with a subpoena *duces tecum* served upon him by the Attorney General in the course of an investigation of subversive activities in New Hampshire as a legislative committee (New Hampshire Laws 1953, Chapter 307 and Laws 1955, Chapter 197) has been judicially reviewed and approved. *Nelson* v. *Wyman*, 99 N. H. 33. By the subpoena in question the Attorney General sought to require Appellant to produce guest registrations in the New Hampshire World Fellowship Center at Albany, New Hampshire for the 1954 and 1955 seasons. Upon Appellant's refusal to comply with the order for the production of the material he was found and adjudicated in contempt, *Wyman* v. *Uphaus*, 100 N. H. 436, and ordered committed until and unless he should purge himself of his contempt by complying with the Court's order. This order of committal was held valid by this Court in *Uphaus* v. *Wyman*, 360 U.S. 72, 3 L.Ed. 2d 1090, 79 S.Ct. 1040. A further hearing on this matter was held on December 14, 1959 and upon Appellant's continued refusal to comply with the order to produce the guest registrations at the World Fellowship Center for the 1954 and 1955 seasons Appellant was again adjudged in contempt and ordered committed until he should purge himself. Appellant's requests to be admitted to bail before both the Superior and Supreme Courts of the State of New Hampshire and this Court have been uniformly rejected, Frankfurter, J. stating in his denial of the motion for bail on July 7, 1960 with reference to this pending appeal:

"The essential contention on which review is proposed to be sought here is thus a local, nonfederal question howsoever paraphrased in intricate, subtle terms."

A further application for bail presented to Mr. Justice Douglas and by him referred to the Court was also denied on September 2, 1960.

There is no substantial Federal question involved in any of the several aspects of this case.

A. No basis exists for a reconsideration by this Court of its decision of June 8, 1959 (360 U.S. 72) a rehearing of which was denied (361 U.S. 856) October 1959.

This Court in its decision of June 8, 1959, supra, upholding the validity of the contempt adjudication, in commenting on the legislative directive stated:

"The Attorney General was commissioned to determine if there were any subversive persons within New Hampshire. The obvious starting point of such an inquiry was to learn what persons were within the State. It is therefore clear that the requests relate directly to the Legislature's area of interest, i.e., the presence of subversives in the State, as announced in its resolution." (360 U.S. 78)

and at Page 79:

"The nexus between World Fellowship and subversive activities disclosed by the record furnished adequate justification for the investigation we here review . . . The investigation was, therefore, undertaken in the interest of self-preservation, 'the ultimate value of any society,' *Dennis* v. *United States*, 341 U.S. 494, 509 (1951). This governmental interest outweighs individual rights in an associational privacy which, however real in other circumstances, cf. *National Association for the Advancement of Colored People* v. *Alabama*, supra, were here tenuous at best."

Further the continued interest of the New Hampshire Legislature and desire for this information was confirmed in *Wyman* v. *Uphaus*, 101 N. H. 139:

> "The legislative history (of New Hampshire laws 1955, Chapter 197) makes it clear beyond a reasonable doubt that it did and does desire an answer to these questions."

This was reaffirmed by the New Hampshire Supreme Court on March 31, 1960 (102 N.H. 461) in its decision overruling Appellant's exceptions to the judgment of contempt and committal order of the Merrimack County Superior Court wherein the court said:

> "The series of statutory enactments on the subject of subversive activities indicates the legislative purpose to continue the Attorney General's authority to investigate subversive activities and not end it when his power expired under chapter 197, Laws 1955. No clearer indication of this is needed than the enactment of chapter 178, Laws 1957, effective June 14, 1957, establishing a permanent authority in the Attorney General two weeks before the date of expiration of his temporary authority. The Legislature has thus shown a live and continuous interest in this subject matter."

and concluded:

> "The constitutionality of the act under which the State proceeded against the defendant (Const. Pt. I, *Art.* 37th) has heretofore been decided and no reason is presented sufficient to warrant re-examination of the subject. See *Nelson* v. *Wyman*, 99 N. H. 33."

Allegations of federal unconstitutionality have been made and disposed of adversely to Appellant in previous litigation. No amount of applied ingenuity of new and additional counsel can alter the fact that Uphaus has had his day in court on all constitutional issues, *ad nauseam*. See: *Wyman* v. *Uphaus*, 100 N.H. 1; *Wyman* v. *Uphaus*, 100 N.H. 436; *Uphaus* v. *Wyman*, 355

U.S. 16; *Uphaus* v. *Wyman*, 356 U.S. 925, 965; *Wyman* v. *Uphaus*, 101 N.H. 139; *Uphaus* v. *Wyman*, 360 U.S. 72; *Wyman* v. *Uphaus*, 102 N.H. 324; *Wyman* v. *Uphaus*, 102 N.H. 461, 159 A.(2d) 160.

There is nothing in the present status of the cause before this Court by *this* appeal that was not already at issue and available to Appellant when this case was argued before the Supreme Court of the United States in November of 1958. The statements contained in the Appellant's Jurisdictional Statement relating to alleged suggested criminality or vilification of persons attendant at World Fellowship, Inc., are, of course, without foundation in fact or in law, as Appellant and his counsel well know. The matter is one of fact-finding investigation and not prosecution. No question of guilt or innocence is here—merely what are the facts. In noting that Appellee had valid reason to believe that the speakers and guests at World Fellowship might be subversive persons within the meaning of the New Hampshire Act this Court said at Pg. 79:

> "The record reveals that appellant had participated in 'Communist front' activities and that '[n]ot less than nineteen speakers invited by Uphaus to talk at World Fellowship had either been members of the Communist Party or had connections or affiliations with it or with one or more of the organizations cited as subversive or Communist controlled in the United States Attorney General's list.' 100 N.H. at 442, 130 A.2d, at 283. While the Attorney General's list is designed for the limited purpose of determining fitness for federal employment. *Wieman* v. *Updegraff*, 344 U.S. 183 (1952), and guilt by association remains a thoroughly discredited doctrine, it is with a legislative investigation—not a criminal prosecution—that we deal here. Certainly the investigatory power of the State need not be constricted until sufficient evidence of subversion is gathered to justify the institution of criminal proceedings." *Uphaus* v. *Wyman*, 360 U.S. 72, 79, 3 L. Ed. 2d 1090, 79 S.Ct. 1040.

Fact finding investigation by the State legislature in fur-

therance of a legitimate end is a valid exercise of an accepted legislative power.

Kilbourn v. *Thompson*, 103 U.S. 168, 26 L.ed. 377, 13 Otto 168

McGrain v. *Daugherty*, 273 U.S. 135, 71 L.ed. 580, 47 S.Ct. 319

Sinclair v. *U.S.*, 279 U.S. 263, 73 L.ed. 692, 49 S.Ct. 268

Jurney v. *McCracken*, 294 U.S. 125, 79 L.ed. 802, 55 S.Ct. 375

Further, it is to be noted that New Hampshire law requires that all persons operating a public camp maintain a register of guests which shall be open to inspection of sheriffs and police officers. (N.H. Rev. Stat. Ann. 353:3) World Fellowship was operated as a public camp furnishing both board and lodging to persons applying therefor.

B. The New Hampshire Legislature's continuation of legislation in this field has not restricted the scope of investigation in this or future cases.

It is urged by Appellant that the permanent legislation (RSA 588:8-a) enacted in 1957 (Laws 1957, chapter 178) in some manner envisions a different scope of investigation because it refers to violations of RSA 588, omitting the words "and to determine whether subversive persons as defined in said act are presently located within this state." The New Hampshire Supreme Court has repeatedly held that the construction of a statute will not be changed by alterations or omissions which are designed to render the provisions more concise.

Noyes v. *Marston*, 70 N.H. 7

Unity v. *Pike*, 68 N.H. 71

Cocheco v. *Strafford*, 51 N.H. 455

Colby v. *Stevens*, 38 N.H. 191

The permanent legislation (not here involved in any event) was drafted by Appellee as were all earlier resolutions of investigation. The words urged as so significant by Appellant were deleted as redundant. The fact of redundancy is obvious from an examination of RSA 588, inasmuch as both "subversive person" and "subversive organization" are defined in said Act, and an investigation of "violations" *a fortiori* requires an investigation to first determine whether such persons are in New Hampshire. The New Hampshire Supreme Court in *Nelson* v. *Wyman*, 99 N.H. 33 at page 37 indicated that the definition of subversive person in what is now RSA 588 might include persons to whom no criminality attached by virtue of the fact that they might extend to unknowing members of subversive organizations, but investigation to arrive at their state of mind (indispensable before there can be a criminal violation) is as much required when seeking to ascertain whether there have been violations of the act as it is "and to determine whether persons as defined in said act are presently located within this state." Further, it is significant, as pointed out in the decision of the New Hampshire Supreme Court in *Uphaus* v. *Wyman* decided June 27, 1960, that these statutory changes in the new permanent legislation have no bearing on the Appellant's position as "[t]he plaintiff stands committed for refusal, while Laws 1955, c. 197 was still in effect, to comply with an order entered prior to enactment of RSA 588:8a." Frankfurter, J. in commenting on this decision in his denial of Appellant's Motion for Bail on July 7, 1960 stated:

> "The contention which the New Hampshire Supreme Court thus rejected turns of course on the construction of New Hampshire law by the New Hampshire Supreme Court. Nor is there any suggestion that in construing the law of New Hampsaire as it did, the New Hampshire Supreme Court placed an inexcusable construction upon New Hampshire enactments in order to evade or defeat a federal right."

Appellant has refused to produce two small packets of cards with the names of guests. These cards are in existence. They

are available—yet Appellant not only did not bring them with him to court but had no intention of doing so in the present proceeding even though ordered to do so by the Court. The relevancy of these registrations to the investigation has been affirmed in *Wyman* v. *Uphaus*, 100 N.H. 436, and by this Honorable Court in *Uphaus* v. *Wyman*, 360 U.S. 72, 79, 3 L.Ed.2d 1090, 79 S.Ct. 1040:

> "Moreover, the Attorney General had valid reason to believe that the speakers and guests at World Fellowship might be subversive persons within the meaning of the New Hampshire Act. The Supreme Court of New Hampshire found Uphaus' contrary position 'unrelated to reality.' Although the evidence as to the nexus between World Fellowship and subversive activities may not be conclusive, we believe it sufficiently relevant to support the Attorney General's action . . ."

Persistent refusal to obey a lawful order of our courts cannot pass unchallenged by any judicial system worthy of the name, particularly after complete and thorough judicial review has upheld the validity of the order.

Davis v. *U.S.*, 269 F.2d 357

Orman v. *U.S.*, 207 F.2d 148

Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186

State of Ohio v. *Morgan*, 164 Ohio St. 529, 133 N.E.2d 104

See *U.S.* v. *United Mine Workers*, 330 U.S. 258, 91 L.Ed 884, 67 S.Ct. 677 wherein the Court said in upholding the restraining order:

> ". . . They had full opportunity to comply with the order of the District Court, but they deliberately refused obedience and determined for themselves the validity of the order . . . Their conduct showed a total lack of respect for the judicial process."

d at 311,312 where the Court said:

"When in a real controversy, such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy.

". . . If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. . . "

None of the questions presented or alleged to be presented the Jurisdictional Statement to which this Motion to Diss is addressed present any federal question of substance.

CONCLUSION

All that is here involved is a situation in which Appellant liberately, wilfully and against the advice of his own counsel tinues to refuse to obey the lawful and constitutional order a state court confirmed by the Supreme Court of the United ates. If the processes of the judiciary are to have any real ality, one who has exhausted his appellate review and still fuses to abide by the civil orders of a court of appropriate risdiction must meet the full action of the contempt power of at court. As has been pointed out in the majority opinion in *phaus* v. *Wyman*, 360 U.S. 72, 81, 3 L.ed 1090, 79 S.Ct. 1040 which none of the Justices of this Honorable Court dissented d which language originated in an opinion of Mr. Justice ack):

". . . we are not at all concerned with the power of the courts to impose constitutional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees."

Throughout the proceedings in this and related Uphaus ca the most extraordinary and unfounded claims of abuse on t part of the Attorney General of New Hampshire (acting as delegated legislative fact-finding committee) have been ma by Appellant and/or his counsel. The sweep of these claims e tended to and appeared in Mr. Justice Brennan's dissent in t original Uphaus case [*Uphaus* v. *Wyman* 360 U.S. 72, 8 where it was urged that this matter involved a pernicious pra tice of exposure for exposure's sake. As appears in the recor including the first report of the committee on January 5, 195 there has been no exposure for exposure's sake in this or oth cases in New Hampshire. Names of persons have not been i discriminately bandied before the public. Reputations have n been smeared. In fact (as required by self-imposed Rules o Procedure) proceedings have been in executive session in a cases except where the witness has requested a public hearin or it has been necessary to transfer the matter to court t compel a recalcitrant witness to give information to which th Legislature is entitled.

No one knows better than Appellant and his counsel that th names requested by the committee are not released to the pres nor to the public under the Rules of Procedure. All who at tended World Fellowship, Inc. are not, *per se,* cursed with some plague because of having been there and no one in his right mind seeing the entire roster would think otherwise. However, it is indisputable that some persons presently or formerly mem bers of the Communist Party were there and were active there, and that Appellant has worked closely with them, ranging from inviting them originally to conferring with them there at length. Such facts are a reasonable and rational concern of the New Hampshire Legislature. They are a reasonable and rational con cern of all thinking Americans who can see as far as ninety miles off the Florida Coast. As this Motion to Dismiss is writ ten, reliable information indicates that a substantial geogra phical portion of the island of Cuba has been blocked off to all persons except upon a pass from the Castro government. What

is being done in these areas or how far Soviet agents or assistants are being employed there is of course in the first instance a matter for the primary concern of the federal authorities. Nevertheless, the community of interest which has in the last analysis impelled urging this Honorable Court to permit state and federal authorities to work together in this delicate and difficult field of keeping abreast of subversion, is every bit as significant in relation to Cuba and New Hampshire as it is in relation to Latin America and the Soviet Union.

In the light of world history and current events it behooves this nation and every state in this nation without persecution and in the exercise of carefully considered and applied constitutional method to keep up with what present or former members of the Communist Party are doing in this country. On this point there can be no question if we and our friends are to survive as free nations.

Those who voluntarily and knowingly appear with, consult with, confer with, attend functions with and otherwise act in concert with Communists or former Communists in America cannot possibly have any reasonable right of privacy in regard to such activities in light of this public record, which proves conclusively that Communism (spelled with a capital C) and its leadership is the mortal enemy of the United States of America, the State of New Hampshire, and the Supreme Court of the United States.

It is respectfully submitted that no new substantial federal question not previously considered by this Honorable Court is presented by the present Jurisdictional Statement no matter the ability of any newly employed counsel nor their diligence in seeking to create within a vacuum such issues by a new combination of words and phrases.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
By: LOUIS C. WYMAN, Attorney General

September 15, 1960.

LE COPY

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 336

WILLARD UPHAUS,

Appellant,

v.

LOUIS C. WYMAN, Attorney General,
State of New Hampshire,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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No. 336.

WILLARD UPHAUS,

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Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

MAY IT PLEASE THE COURT:

Appellee has filed a motion to dismiss, not in his own name but on behalf of the State of New Hampshire; and the caption improperly refers to the State of New Hampshire as appellee. Since the State of New Hampshire is not a party of record, the motion is insufficient and should be stricken. We would however raise no objection to a correction of this defect if made promptly enough to avoid delay of the case; and, on the assumption that such correction will be made, we submit this brief in response to the motion.

The motion to dismiss is addressed exclusively to Point II of the Jurisdictional Statement. Appellee ignores the considerations presented in Points I and III although, for the reasons there stated, they are in themselves sufficient to

warrant acceptance of jurisdiction by this Court. There is no need to discuss them further here.

As to Point II, appellee offers a number of somewhat disconnected contentions, some of which are quite startling, and all of which serve to emphasize the fact that Point II presents an entirely new question not adjudicated on the prior appeal.

It will be recalled that the question raised by Point II is whether a one-man legislative "committee" can continue an intrusive investigation which impinges heavily on the rights of speech and assembly, after the legislature itself has terminated the statute which contained its original declaration of interest in the subject matter. Appellee cannot and does not contend that this important issue was settled by the decision on the prior appeal, but nevertheless urges that the appeal should be dismissed. We wish to comment briefly on the grounds advanced by appellee in support of this view.

First, appellee asserts (Motion, p. 5) that the question arising out of the termination of the declaration of legislative interest in the presence of "subversive persons" in New Hampshire was "already at issue and available to appellant" in November, 1958, when the previous appeal was argued. This is not so. The termination did not occur until June 14, 1957, when N. H. Laws 1957, c. 178, was enacted. But, as noted at page 17 of the Jurisdictional Statement, the issues on the previous appeal had already been defined by the notice of appeal filed April 26, 1957; and no reference was made to the 1957 statute by either party or by the Court, throughout the course of that appeal.

Second, appellee says that it makes no difference whether the legislative interest in the presence of "subversive persons" has now ended. In support of this position he quotes

and relies on the opinion rendered by the New Hampshire Supreme Court on June 27, 1960. That opinion expressly recognized that the 1955 statute authorizing the "subversive persons" investigation is no longer in effect, but held that appellant can still be imprisoned to coerce compliance with an order designed to implement that investigation. We do not deny the final authority of the highest state court to place so harsh a construction upon the applicable state statutes but we do contend that, as so construed, they violate the Federal Constitution.

If our motion for bail did not make our position entirely clear in this respect, we regret it. The opinion rendered by Mr. Justice Frankfurter July 7, 1960, on denial of that motion, describes our "essential contention" as an attack on the state court's construction of the 1955 statute. At pages 23-30 of our Jurisdictional Statement, subsequently filed, we have endeavored to avoid any possibility of misapprehension in this regard. We assume that the New Hampshire legislature did intend its "committee" to continue in pursuit of information which the legislature itself no longer wanted. But we say that such action cannot possibly aid in the accomplishment of a remedial legislative purpose, and therefore violates the due process clause and the prohibition on bills of attainder.

This is by no means the first case where official action which has been held valid in one context has been rendered invalid by a supervening change of circumstances. For example, compare *Block* v. *Hirsh*, 256 U. S. 135 (1921) with *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 547-548 (1924) where the Court declared (per Holmes, J.):

> "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed. *Perrin* v. *United States*, 232 U. S. 478, 486, 487. *Missouri* v.

Chicago, Burlington & Quincy R. R. Co., 241 U. S. 533, 539, 540. In *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, a statutory rate that had been sustained for earlier years in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, was held confiscatory for 1918 and 1919."

Compare *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 442 (1934) (per Hughes, C. J.).

The action of the New Hampshire legislature in terminating its request for information as to the presence of "subversive persons" within the state changes the whole factual basis of this Court's earlier decision. The Court's opinion was premised squarely and solely on the assumption that the New Hampshire *legislature*, not merely the New Hampshire *Attorney General*, was interested in the subject matter.

The precise significance of the declaration of legislative interest should be kept in mind. Appellant has objected to production of the names on the ground that no legislative purpose would thereby be served, and that the only effect of the exposure would therefore be to punish exercise of the right of peaceable assembly—an objective which this Court has repeatedly held to be unconstitutional. On the prior appeal this contention was rejected on the ground that the New Hampshire legislature had asked to be informed as to the presence of "subversive persons" in the state; that appellee's demand for the names could be explained as an effort to comply with that request; and that the exposure therefore did not necessarily imply a purely punitive objective. The declaration of legislative interest was thus a *constitutionally necessary fact*, without which the inquiry would have been condemned as "exposure for exposure's sake" even if the legislature had explicitly stated its intention to authorize purely punitive exposure.

Now that the declaration of legislative interest has been withdrawn, we say that the demand for the names can no longer be accounted for except as a punitive measure.

Point II of the Jurisdictional Statement does not raise the "local, nonfederal question" whether the New Hampshire legislature *intended* appellee to conduct a purely punitive investigation, but the Federal question whether an investigation of such a character is forbidden by the due process and bill of attainder provisions of the United States Constitution.

THIRD, appellee contends that the declaration of legislative interest contained in the permanent 1957 statute, which directs him to investigate and report on violations of the Subversive Activities Act of 1951, is just as broad as the declaration of legislative interest contained in the earlier temporary statutes—which, *in addition* to reports of such violations, called for reports on the presence of "subversive persons" in the state. Appellee says (Motion, pp. 6-7) that the words "and to determine whether subversive persons * * * are presently located in this state" have simply been "deleted as redundant."

In taking this remarkable position, appellee not only disregards the plain meaning of the words (see Jurisdictional Statement, pp. 18-20), but repudiates the interpretation adopted by the New Hampshire Supreme Court. In *Nelson* v. *Wyman*, 99 N. H. 33, 37, 105 A. 2d 756, 762 (1954), that Court, referring to the same statutory language as is here involved, declared:

> "The fact that the resolution requires an investigation with respect to violations of law as well as a determination of 'whether subversive persons as defined in said act are presently located within the state' does not remove the inquiry from the category

> of a legislative investigation. The inquiry *is not confined to an investigation of violations of the act* but includes a determination of whether there are presently in this state *those persons whose acts are not criminal but who are classified as subversive persons* * * *." (Emphasis added.)

Appellee's own official Report to the New Hampshire Legislature, dated January 5, 1955—the only report which has ever resulted from this investigation, from 1953 until now—expressly refers to the above ruling and, in reliance thereon, declares that the inquiry "goes far beyond" violations of law (Report, p. vii). In the course of its 255 pages, the Report names great numbers of individuals and describes in detail their organizational affiliations and activities, both in New Hampshire and elsewhere. No single one, however, is said to have violated the law. Had violations been disclosed, it would have been appellee's duty to report them and to initiate prosecutions. His failure to do so compels the conclusion that no violations were found to exist. The only remaining subject matter which appellee was directed to investigate was the presence of "subversive persons" in the state. It follows that the whole of the 1955 Report must have been intended to show the presence or absence of people who, in the above-quoted words of the New Hampshire Supreme Court, were "not criminal but who are classified as subversive persons."

Perhaps appellee will be heard to maintain, as he does, that the very language which has been held to supply the constitutionally requisite declaration of legislative interest is now to be disregarded as surplusage. But his contention that the present legislative interest in *violations of law* provides rational justification for exposure of the names of hundreds of people as to whom there is no ground for suspecting such violations, presents a new and substantial Federal question not adjudicated on the prior appeal. Our

position, as stated at page 23 of the Jurisdictional Statement, is that such an inquiry has no reasonable relationship to the declared legislative purpose and can only be explained as a punitive measure.

In this connection it should be kept in mind that the statutory definition of "subversive person" is a wholly artificial one. In ordinary parlance it is a contradiction in terms to say that a person is *innocently* subversive, since the term "subversive" implies conscious approval of revolutionary methods. The statutory definition is drawn much more broadly, and many if not most of the persons embraced within it could not be considered subversive in the usual meaning of the term. Consequently, identification of an individual as a "subversive person" in the statutory sense affords no ground whatever for a suspicion that he has violated the law.

FOURTH, appellee asserts (Motion, p. 10) that "there has been no exposure for exposure's sake" in the course of his investigation; and he particularly refers to his 1955 Report to the New Hampshire Legislature as being unexceptionable on this score. This is not the place to engage in an extended review of the Report, which has been fairly and fully summarized in the dissenting opinion of Mr. Justice Brennan on the prior appeal. For present purposes it is enough to invite attention to pages 137-156, dealing with the persons who had been speakers at World Fellowship in 1953 and 1954.

The Report first deals with 27 of these speakers individually, detailing information which appellee presumably thought pertinent to the question whether they were "subversive persons." The Report then says as to the remaining 36 speakers that "it has not been possible to check each of these persons thoroughly" because of "the burden of work imposed on the staff of the House Committee on

Un-American Activities by thousands of such requests received from all over the country." The Report goes on to say that appellee had no information indicating "records of affiliation with or support of Communist causes on the part of these people" (p. 154). Yet it proceeds (*ibid.*):

> "Inasmuch as no committee or public agency can hope to have all the information in its files concerning all subversive activity all over this country, it is not possible for this office to guarantee that the following individuals do not have such activity in their backgrounds. Therefore, it is necessary to report their identities to the General Court . . ."

And on the next two pages the names of these 36 persons are set forth.

Appellee says this is not exposure for exposure's sake. We ask what purpose it could have served, other than punishment for exercise of the constitutional rights of speech and assembly? And we ask, further, why it is not fair to assume that the names of guests at World Fellowship, if made available to appellee, would be used in the same way?

FIFTH, appellee refers to the New Hampshire statute requiring operators of hotels, public lodging houses, tourist camps and cabins to maintain a guest register which shall be "open to the inspection of the sheriff or his deputies and to any police officer." N. H. Rev. Stat. Ann., 1955, c. 353, §3. This New Hampshire statute was brought to the Court's attention on the prior appeal. The Court did not regard it as decisive—possibly because the names sought by appellee include the names of guests who did not take overnight lodgings at World Fellowship, so that, as the Court said (360 U. S. at p. 80, n. 7), "the lists sought were more extensive than those required by the statute." But the Court evidently did take the statute into account in

striking a balance between the legislative demand for the names and the claim of associational privacy.

We submit that the statute has no material bearing on the present case. On its face it is a measure designed to facilitate the work of local law enforcement officials. Sheriffs, deputy sheriffs and police officers have no right to publicize the name of a guest except in the course of criminal proceedings, and if there is no reason to believe that a crime has been committed they have no right to publicize it at all. Appellee, however, claims and has exercised the right to submit a privileged public report to the legislature identifying persons *not* charged with any violation of law, in a context which could only result in their being exposed to general opprobrium.

It should not be overlooked that the penalty for violation of the statute is a fine of not more than $20 or imprisonment for not more than thirty days. Even if appellant had refused to let a sheriff, deputy sheriff or police officer inspect the guest lists—which he did not—his punishment could not have been nearly so great as that which he has undergone.

Finally, appellee makes the broad contention (Motion, p. 11) that those who "attend functions with * * * Communists or former Communists in America cannot possibly have any reasonable right of privacy in regard to such activities." This is the real premise on which his investigation has proceeded. We deny the validity of appellee's position. For if it be held valid, by dismissal of the present appeal or affirmance of the judgment below, the right of peaceable assembly can no longer be exercised in safety —either by Communists or by non-Communists or by anti-Communists.

The Federal questions presented are not only substantial and important, but are of the gravest consequence. The motion to dismiss the appeal should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 336.—October Term, 1960.

Willard Uphaus, v. Louis C. Wyman, Attorney General.	On Appeal From the Supreme Court of New Hampshire.

[November 14, 1960.]

Per Curiam.

In view of the Court's decision in *Uphaus* v. *Wyman*, 360 U. S. 72, rehearing denied, 361 U. S. 856, the motion to dismiss is granted and the appeal herein is dismissed for want of jurisdiction, in that the judgment sought to be reviewed is based on a non-federal ground.

SUPREME COURT OF THE UNITED STATES

No. 336.—October Term, 1960.

Willard Uphaus, v. Louis C. Wyman, Attorney General.	On Appeal From the Supreme Court of New Hampshire.

[November 14, 1960.]

Mr. Justice Brennan.

The New Hampshire Supreme Court has held in this proceeding that the New Hampshire Legislature still wanted Dr. Uphaus' answers on December 14, 1959, notwithstanding the omission from Laws 1957, c. 178, of the provision of Laws 1955, cc. 340 and 197, authorizing the Attorney General "to determine whether subversive persons . . . are presently located within this state." *Wyman* v. *Uphaus*, 102 N. H. 461; on denial of motion for bail, — N. H. —. We are bound by the highest state court's construction of the pertinent New Hampshire statutes. We must therefore consider the substantiality of the federal constitutional questions presented on this appeal on the basis of that construction and not upon the premise urged by Dr. Uphaus that the 1957 statute shows that the legislature on December 14, 1959 no longer wanted him to produce the list of names. In consequence, while I remain of the view that the Court in *Uphaus* v. *Wyman*, 360 U. S. 72, incorrectly sustained the previous order of civil contempt made against Dr. Uphaus, see dissent at page 82, that holding, while it stands, also sustains the order challenged on this appeal. Solely under compulsion of that decision, I think that the appeal must be dismissed as not presenting a substantial federal question.

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[November 14, 1960.]

Mr. Justice Black, with whom The Chief Justice and Mr. Justice Douglas concur, dissenting.

I concur in the dissent of Mr. Justice Douglas and agree with him that since the New Hampshire law upheld by this Court in *Uphaus* v. *Wyman*, 360 U. S. 72, has now been changed, a new federal question is presented which cannot be dismissed as involving only the correctness of a ruling on local law, and that we consequently should not dismiss this appeal but should note jurisdiction, grant bail and hear arguments. The recent amendment withdrew the power, involved in the previous appeal, which authorized the Attorney General of New Hampshire "to determine whether subversive persons . . . are presently located within" the State, and thus took away the very power under which the Attorney General was acting when he demanded the names of guests at the summer camp in New Hampshire managed by the appellant, Dr. Willard Uphaus. Notwithstanding that fact, the New Hampshire courts have held that the State still has an interest in those names sufficient to justify the continued imprisonment of Dr. Uphaus for his refusal to comply with the demand to produce them.[1] This appeal

[1] As indicated by my concurrence in the opinion of Mr. Justice Douglas, I think the better interpretation of that holding is that it rests upon the theory that the imprisonment is for criminal contempt, and I think that Mr. Justice Douglas conclusively demonstrates

therefore raises federal questions as to whether this latter holding violates the Federal Constitution. I think that the Court's action today in treating those federal questions as insubstantial[2] is wrong in at least two different respects.

First, I think this action is inconsistent with the Court's own test as set forth in its opinion on the prior appeal and there used to square the imprisonment of Dr. Uphaus with the First Amendment. That test was stated in these terms: "The interest of the guests at World Fellowship in their associational privacy having been asserted, we have for decision the federal question of whether the public interests overbalance these conflicting private ones."[3] This required the Court to weigh the interest of those guests against the interest of the State, as broadly expressed by its legislature, in knowing "whether subversive persons . . . are presently located within" the State, a balancing process[4] which there resulted in the conclusion that the state interest must prevail. Now, however, it is clear that the interest of the State so weighed no longer exists and a new balance must be made if the invasion of "associational privacy" previously sanctioned is to be permitted to continue. But this

---

that if that is so, this Court cannot properly refuse review of that imprisonment. But the Court's dismissal of the appeal is an implicit holding that the New Hampshire Supreme Court's action rests upon the civil contempt theory. Even upon that view, however, I think the present appeal raises federal questions both new and substantial.

[2] Implicit, of course, in the Court's order dismissing this appeal because the judgment is based on a nonfederal ground is the holding that the federal questions actually presented are insubstantial.

[3] 360 U. S., at 78.

[4] My opinion of this balancing process, when applied as here to justify direct abridgments of First Amendment freedoms, has been fully expressed in previous cases. See, *e. g.*, *Barenblatt* v. *United States*, 360 U. S. 109, 141–146 (dissenting opinion), *Beauharnais* v. *Illinois*, 343 U. S. 250, 268–270, 274–275 (dissenting opinion).

the Court refuses to do, apparently on the theory that the present appeal is controlled by the previous disposition. It seems to me that "balancing" which refuses to take note of such an important change in the interest of the State is little balancing at all—a mere illusion, in fact.

Secondly, it seems to me that the record as it now stands before this Court requires a reappraisal of the question whether the actions of the State of New Hampshire constitute a bill of attainder in violation of Art. I, § 10, of the Constitution. On the prior appeal, the majority of this Court held that the record *as it then stood* would not justify such a conclusion.[4] The present record, however, presents new facts relevant to that issue. For here we are confronted with a situation in which the courts of New Hampshire have stated that it was the intention of the legislature of that State to permit the Attorney General to single out Dr. Uphaus and any others (if, indeed, there are any others) against whom investigative proceedings had already been commenced and to pursue those proceedings, not in furtherance of any general aim of the State—that general aim, if it ever existed, has been abandoned by the amendment—but apparently for the sole purpose of setting these people off for special treatment. What this special treatment is to be is clearly shown by the brief filed before this Court in this appeal by the State Attorney General himself, who administers the Act. That brief states unequivocally that "[t]hose who voluntarily and knowingly appear with, consult with, confer with, attend functions with and otherwise act in concert with Communists or former Communists in America cannot possibly have any reasonable right of privacy in regard to such activities. . . ."[5] In the light

[5] Thus, the case falls squarely within the holding of this Court in *United States* v. *Lovett*, 328 U. S. 303, 315–316, in that it imposes special pains and penalties upon an easily ascertainable group.

of all these new facts, the decision upon the former appeal is not and cannot properly be held to be dispositive of the question whether *this* record shows that New Hampshire is unconstitutionally imposing a bill of attainder upon Dr. Uphaus.

I think the summary dismissal of this appeal without even so much as the benefit of oral argument, when the abridgment of the rights of free speech and assembly is so obvious, is a sad indication of just how far this Court has already departed from the protections of the Bill of Rights and an omen of things yet to come. Such retrogression, of course, follows naturally from the Court's recent trend toward substituting for the plain language of the commands of the Bill of Rights elastic concepts which permit the Court to uphold direct abridgments of liberty unless the Court views those abridgments as "arbitrary," "unreasonable," "offensive to decency" or "unjustified on balance,"[6] for these concepts reduce the absolute commands of the Constitution to mere admonitions. I think it is time for all who cherish the liberties guaranteed by the Bill of Rights to look closely at the disastrous consequences upon those liberties which have resulted from the Court's use of such concepts. In my mind, the present case graphically illustrates those consequences when it is stripped of the ambiguous legal formulations which have been imposed upon it and considered in the context in which it actually arose—the conduct of Dr. Uphaus as an individual.

He is a citizen of this country by birth. Throughout the nearly seventy years of his life, evidently from early boyhood, he has been a deeply religious person. The record shows his active membership in and official service for various Methodist churches in the communities where

[6] *See, e. g., Beauharnais* v. *Illinois*, 343 U. S. 250; *Rochin* v. *California*, 342 U. S. 165; *American Communications Comm'n* v. *Doud*, 339 U. S. 382.

he has lived. The value of that membership and those services is attested by affidavits filed by the pastors of those churches. The record further indicates, without dispute, that he is a man whose life has been dedicated to the principles of his religion. He holds a degree as a Doctor of Theology. He taught religious education at Yale University and was associated with the Religion and Labor Foundation for a number of years. Over the years, his religious faith manifested itself in an increasing opposition to war. It was this belief which led him, in 1952, to become the Director of World Fellowship, Inc., a summer camp operated, he says, in the interest of promoting the ideas of pacifism.

Almost immediately upon his arrival at World Fellowship, Dr. Uphaus came under the fire of an investigation being conducted by the Attorney General of New Hampshire, apparently on the theory that World Fellowship was frequented by "subversive" persons. Eventually, as the Director of World Fellowship, he was called before the Attorney General to testify. At the very outset of the hearing before the Attorney General, he expressed a complete willingness to answer any question concerning himself, including any views he might hold or any actions he might have taken with regard to any subject. In addition, he expressed a willingness to give the Attorney General any information which might be wanted in regard to the subject matter of any speeches made at World Fellowship. But he absolutely refused to give the Attorney General: (1) a list of the nonprofessional employees of the camp; (2) a list of all the guests who had stayed at the camp; and (3) his personal correspondence with the speakers who had appeared at the camp. Upon being met with this refusal, the Attorney General sought a court order requiring Dr. Uphaus to produce these items. At the resulting hearing, the court, apparently viewing the request of the Attorney General for the names of the

camp's dishwashers and floor sweepers as totally unreasonable and being uncertain as to the legal amenability to subpoena of the correspondence, ordered Dr. Uphaus to produce only the names of the guests. This, Dr. Uphaus persisted, he could not do, resting his refusal upon the following reasons, to which he has adhered throughout this long ordeal: (1) because "by the direct teachings of the Bible . . . it is wrong to bear false witness against my brother; and inasmuch as I have no reason to believe that any of these persons whose names have been called for have in any sense hurt this state or our country, I have reason to believe that they should not be in the possession of the Attorney General"; (2) because "the social teachings of the Methodist Church . . . condemn guilt by association";[7] and (3) because "I love this document [the Bill of Rights] and I propose to uphold it with the full strength and power of my spirit and intelligence."

Nonetheless, the order to produce was upheld and Dr. Uphaus was imprisoned for his failure to comply with it. As a result, he has been in jail since last December 14 under a judgment which sentenced him to imprisonment for one year or until such time as he would comply with the order to produce. His plight, however, is even worse than would normally be indicated by that sentence in that there can be no assurance at all that he will be released at the end of the year specified. The

[7] At the hearing upon remand of these proceedings to the New Hampshire courts following this Court's affirmance of the first contempt order, Dr. Uphaus expanded this second reason to encompass the teachings of all religions. Relying upon a recent article by a Professor of Church History at Harvard University, Williams, Reluctance To Inform, 14 Theology Today 229, Dr. Uphaus argued that his position with respect to informing against his friends is required by the historic traditions of all religions. That article pointed to the indisputable truth that religious groups have time and again resorted to a refusal to inform as a shield against persecution.

Attorney General of New Hampshire insists, notwithstanding the recent legislation reducing his powers, that he has a right to continue all investigations presently pending, and the Supreme Court of New Hampshire apparently agrees with him. This Court, by its action today, necessarily takes the position that this serious abridgment of the rights of free speech and peaceable assembly does not even raise a substantial federal question. As a result, it is entirely possible that Dr. Uphaus will be subjected to new questioning and forced into a new "contempt" as soon as he serves out this year's imprisonment. The brief filed by the Attorney General of New Hampshire makes it appear that he has every intention of doing just that. Thus, a distinct possibility exists that this man who, at least so far as these records show, has never committed a single crime, nor even so much as an immoral act, faces imprisonment for the rest of his life. This simply because he has refused to violate his religious principles and sacrifice his constitutional rights by disclosing the names of those with whom he has peaceably assembled to discuss public affairs in this country.

In this respect, the predicament of Dr. Uphaus may be likened to that of the defendant in the famous *Sheriff's Case* before the House of Lords in 1767.[8] There the City of London sought to prosecute a religious dissenter for refusing to serve in the office of sheriff as required by its by-laws. The defense was that the Corporation Act[9] would have made it a crime for a dissenter to serve in that office for it required an oath from all office-holders that they had taken the sacraments of the Church of England within the year. The dilemma of the dissenter was

[8] *Harrison* v. *Evans*, 1 Eng. Rep. 1437.

[9] 13 Charles II, c. I.

vividly described by Lord Mansfield in stating his views on the case:

> "Make a law to render them incapable of office; make another, to punish them for not serving. . . . If they accept, punish them; if they refuse, punish them; if they say, yes, punish them; if they say, no, punish them. My Lords, this is almost exquisite dilemma, from which there is no escaping; it is a trap a man cannot get out of; it is as bad persecution as the bed of Procrustes: If they are too short, stretch them; if they are too long, lop them." [10]

This technique of putting unorthodox groups into a position where their only real choice is between various alternative punishments (a technique the prevalence of which today extends far beyond the borders of New Hampshire) is strikingly similar to that being utilized here against Dr. Uphaus. If he testifies, his friends will suffer; if he refuses to testify, he goes to jail. The dilemma is truly one "from which there is no escaping" for a man who, like Dr. Uphaus or like the religious dissenter in the *Sheriff's Case*, cannot bring himself to sacrifice either his religious principles or his legal rights.

That case also serves to highlight a most unfortunate aspect of the decision in this case. For there, nearly two hundred years ago and in England where there was no Bill of Rights, the House of Lords refused to countenance the use of that technique. They held it to be inconsistent with the Toleration Act [11] by which Parliament had guaranteed religious freedom even though the terms of that guarantee were far less sweeping and more limited in application than the absolute commands of our

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[10] Lord Mansfield's statement does not appear in the report of the case cited above. It is, however, fully reproduced in The Palladium of Conscience, a collection of writings on religious liberty, at 142, 153.

[11] 1 William & Mary, c. XVIII.

First Amendment. In my view, the majority's disposition of this case, reducing as it does those absolute commands to mere admonitions, means that our First Amendment amounts to something less as a charter of freedom than England's Toleration Act was held to be. This in the very face of the indisputable historical fact that one of the primary reasons for the establishment of this country was the desire of early settlers to escape religious persecution.

I do not suggest, of course, that this imprisonment of Dr. Uphaus is without precedent in history. Indeed, I am painfully aware that there are a multitude of such precedents extending from many centuries back in the past and continuing forward in an almost unbroken line to the present day. There is, for example, the case of the Puritan minister John Udall in 1590, a case which bears a strong similarity to that of Dr. Uphaus. Udall was called before a court in connection with the investigation of the authorship of certain religious tracts which, in the words of one of the judges, "tend[ed] to the overthrowing of the State, and the moving of Rebellion." [12] That court sought to force Udall to disclose the identity of other Puritans so that it might question them as to the authorship of the tracts. In refusing to divulge the demanded names, Udall gave his reasons in a statement not unlike that of Dr. Uphaus before the New Hampshire court. "I will take an oath of allegiance to he. majesty, wherein I will acknowledge her supremacy according to statute, and promise my obedience as becometh a subject; but to swear to accuse myself or others, I think you have no law for it." [13] Udall, like Dr. Uphaus, was sentenced to jail for civil contempt under a judgment which o 'ered his imprisonment until such time as he would consent to

[12] 1 Howell's State Trials 1271, 1294.

[13] *Id.*, at 1275.

testify.[14] But such coercion was as ineffective in that case as it has been to date in this. Udall's dauntless spirit was never broken even though his body was. He died in prison within a few years.

It would not be difficult to point out many other cases such as that of Udall, but I will content myself with one other. Some seventy years after John Udall's experiences, there was a dissenting preacher in England named John Bunyan. He was arrested for preaching and efforts were made to get him to agree not to preach any more. He refused to be coerced into silence. The result was that he was put through a kind of trial [15] and sentenced to prison for holding "several unlawful [religious] meetings . . . to the great disturbance and distraction of the good subjects of this kingdom . . . ." [16] In Bunyan's case the imprisonment lasted 12 years, and it was during those 12 years that he gave to the world The Pilgrim's Progress.[17]

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[14] *Id.*, at 1276. Although the term "civil contempt" was not used, the following colloquy reported between Udall and the Bishop of Rochester, one of the judges at his trial, makes it clear that such was the nature of his sentence:

"Roch. The day is past, and we must make an end: will you take the oath.

"U. I dare not take it.

"Roch. Then you must go to prison, and it will go hard with you, for you must remain there until you be glad to take it."

[15] See Bunyan's own report of the events surrounding his imprisonment, A Relation of the Imprisonment of Mr. John Bunyan, in Grace Abounding and The Pilgrim's Progress, at 103–132 (Brown ed., 1907).

[16] *Id.*, at 114.

[17] Brown, John Bunyan, at 253–262, casts some doubt upon this traditional version of the genesis of The Pilgrim's Progress by suggesting that it was written, not during this 12 years' imprisonment, but a few years later during another shorter incarceration. See, also, The Encyclopedia Brittanica, Vol. IV, at 392 (1957 ed.); Dictionary of National Biography, Vol. III, at 280.

One of the judges who acquiesced [18] in the imprisonment of Bunyan was Sir Matthew Hale, later Lord Chief Justice Hale, a man described by Lord Campbell as "one of the most pure, the most pious, the most independent, and the most learned" Chief Justices England ever

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[18] It is difficult to ascertain with precision the extent of Hale's part in this matter. He was not one of the judges who conducted such trial as Bunyan was accorded, which resulted in his prison sentence. But, several months later, he, with Justice Twisden, were presented with a petition challenging the legality of Bunyan's conviction and seeking his release. The colloquy between Mrs. Bunyan, who presented that petition, and the two judges is reported in Bunyan, A Relation of Imprisonment, *supra*, from which it appears that Hale was quite sympathetic to Bunyan's plight. Nonetheless, he refused to order his release, apparently on the belief that he was powerless to do so. Thus he is quoted as having said: "I am sorry, woman, that I can do thee no good; thou must do one of those three things aforesaid, namely; either to apply thyself to the King, or sue out his pardon, or get a writ of error . . . ." *Id.*, at 130. An accurate evaluation of the legal correctness of Hale's position is difficult but it may be pointed out that it is inconsistent with the claim made in Bunyan's report that his wife had previously petitioned the House of Lords and had been told that the question of her husband's release had been placed in the hands of the judges at the next assize (the assize at which Hale and Twisden were sitting), and also with a statement attributed to Justice Twisden by that report: "What, will your husband leave preaching? If he will do so, then send for him." *Id.*, at 128. On the other hand, Judge Hale's refusal to act without a "writ of error" was consistent with the general judicial attitude of caution attributed to him in 3 Hallam, The Constitutional History of England, at 214 (2d ed., 1829). Hallam there criticized English lawyers for "dwell[ing] on the authorities of Sir Edward Coke and Sir Matthew Hale" in treason cases because "these eminent men, and especially the latter, aware that our law is mainly built on adjudged precedent, and not daring to reject that which they would not themselves have asserted, will be found to have rather timidly exercised their judgment in the construction of this statute, yielding a deference to former authority which we have transferred to their own." For a sympathetic treatment of Hale's part in the Bunyan case, see 2 Campbell, Lives of the Chief Justices of England, 219–222.

had.[19] That this description is not entirely unjustified, despite the fact that his record was also marred by the part he took in the conviction and sentencing to death of two unfortunate women as witches [20] is, I think, a tragic commentary upon the record of the judiciary, throughout the centuries, in discharging its duty to protect civil liberties. It is perhaps one of the ironies of history that the name of John Bunyan, a poor tinker and preacher, is at least as well known and respected today as that of the great Chief Justice of England who permitted him to languish in jail.

My guess is that history will look with no more favor upon the imprisonment of Willard Uphaus than it has upon that of Udall, Bunyan or the many others like them. For this is another of that ever-lengthening line of cases where people have been sent to prison and kept there for long periods of their lives because their beliefs were inconsistent with the prevailing views of the moment. I believe the First and Fourteenth Amendments were intended to prevent any such imprisonments in this country. The grounds urged by the Attorney General of New Hampshire here are, as shown by the cases of Udall and Bunyan, precisely those that have always been urged for throwing dissenters in jail, namely, that they are a menace to the community and it is dangerous to leave them free. It may be true, as the Attorney General of New Hampshire suspects, that Dr. Uphaus has at some time been in the company of Communists, or that the people who have been in his camp have been in the company of Communists. But even if it is true and those associates are as bad as they are suspected to be, it is my belief that our Constitution with its Bill of Rights

[19] 2 Campbell, Lives of the Chief Justices of England, at 171. See also Burnett, The Life and Death of Sir Matthew Hale; Foss, The Judges of England, at 105–116; Dictionary of National Biography, Vol. VIII, at 902–908.

[20] See 6 Howell's State Trials 687.

absolutely forbids the imposition of pains and penalties upon him for peaceably assembling with them. That great charter was drafted by men who were well aware of the constant danger to individual liberty in a country where public officials are permitted to harass and punish people on nothing more than charges that they associate with others labeled by the Government as publicans and sinners.

SUPREME COURT OF THE UNITED STATES

No. 336.—October Term, 1960.

Willard Uphaus. v. Louis C. Wyman, Attorney General.	On Appeal From the Supreme Court of New Hampshire.

[November 14, 1960.]

Mr. Justice Douglas, with whom The Chief Justice and Mr. Justice Black concur, dissenting.

I would note jurisdiction in this case for several reasons.

First. Dr. Uphaus is in prison for civil contempt for failure to deliver to a state investigating agency lists which he claims are constitutionally protected from disclosure. On June 8, 1959 we affirmed his conviction in the state courts of New Hampshire by a divided vote. *Uphaus* v. *Wyman*, 360 U. S. 72. Following the remand in that case Uphaus was given a further hearing at which questions never before presented to us were raised. The law under which Uphaus is committed was L. 1953, c. 307, L. 1955, c. 197, c. 340 directing the Attorney General "to determine whether subversive persons . . . are presently located within this state." That law, however, no longer exists. For in 1957 the authority of the Attorney General of New Hampshire was limited to making investigations of violations of law. L. 1957, c. 178. As respects this change in legislation, the New Hampshire Supreme Court on June 27, 1960, said: [1]

> "Our opinion of March 31, 1960,[2] did not turn upon any holding that RSA 588:8a provided an extension of the legislative investigation first authorized in

[1] *Uphaus* v. *Wyman*, 102 N. H., 517, 518.

[2] *Wyman* v. *Uphaus*, 102 N. H., 461.

> 1953. The plaintiff stands committed for refusal while Laws 1955, c. 197 was still in effect, to comply with an order entered prior to enactment of RSA 588:8a."

The majority conclude that this is a ruling on local law only and therefore presents no federal question. That plainly would be right if this were a commitment for criminal contempt and if it may be constitutionally imposed. The expiration of a law normally would be no defense to violations committed while it was in force. But this is a case of civil contempt used for its coercive authority to make the defendant produce the documents which were demanded. In such a case the defendant carries the keys to freedom in his own pocket, as we pointed out in *Uphaus* v. *Wyman*, *supra*, 81. But the requirement to produce assumes that their production is relevant to some interest of the State. As stated in *Uphaus* v. *Wyman*, *supra*, at 78:

> "What was the interest of the State? The Attorney General was commissioned to determine if there were any subversive persons within New Hampshire. The obvious starting point of such an inquiry was to learn what persons were within the State. It is therefore clear that the requests relate directly to the Legislature's area of interest, *i. e.*, the presence of subversives in the State, as announced in its resolution."

That interest no longer exists, by reason of the statutory change that I have noted. The Supreme Court of New Hampshire in its opinion of June 27, 1960, quoted above, concedes that it does not rely on "an extension of the legislative investigation first authorized in 1953." 102 N. H., at 518. In other words the Attorney General is no longer authorized to investigate whether "subversive persons" are present in the State. That is to say, the answers are no longer relevant to any existing legislative project.

Thus a new and important question is presented in this second appeal which is now filed with us. May a person be incarcerated for civil contempt for failure to produce documents to a legislative committee when the committee is no longer authorized to investigate the matter? If, of course, the 1957 Act extended this authority respecting pending cases, the conclusion of the majority that the question is a local, nonfederal one, so far as the contempt issue is concerned, would obviously be correct. But the opinion of the Supreme Court of New Hampshire rendered June 27, 1960, rejects that construction of the New Hampshire statutes. It treats the offense as completed while the earlier Act was in force. I can read its opinion of June 27, 1960, to mean only that it considered the case as if it involved criminal rather than civil contempt. For the criteria it considered relevant have no apparent pertinency when an issue of civil contempt is tendered.

Are the principles announced in *Uphaus* v. *Wyman*, *supra*, applicable to criminal as well as to civil contempt? Perhaps so. But the careful delineation of the issues in that case made by my Brother CLARK, who wrote for the majority, restricts the case to civil contempt. As appellant states in his brief, the conditional nature of a civil contempt order "makes tolerable the omission, from civil contempt proceedings, of many of the procedural safeguards with which criminal proceedings are hedged about. . . ." Are the due process problems no different when the prisoner, who invokes the First Amendment, can go to prison for 10 years or for life and when he has the keys to the prison in his own pocket? If the two cases are not different, then local law questions decide the case. But we should not decide without argument that there is no difference in due process terms between the two cases.

The Supreme Court of New Hampshire in its June 27, 1960 opinion stresses that the point now pressed was

"not presented in the pending proceedings at any time, until first advanced before the Superior Court on December 14, 1959, the day on which the order of committal was entered." 102 N. H., at 518. That seems to be true. But no waiver of the point appears to have been made. It is true that at the hearing counsel for Uphaus stated that his client had a legal duty to comply.

> "Your Honor please, it is not our purpose to deny that Willard Uphaus is under legal obligation to answer the question which has been propounded to him. We have explained to him his legal obligation, and he understands it. It is our contention that this is a real matter of conscience; that he feels bound to a higher obligation even than the direction of the court . . . . We are not contending at all that he is not obligated to answer the question."

But the transcript makes clear that the attorneys for Uphaus made two separate points. First, they argued that the 1957 amendment to the statute deprived the Attorney General of his power to investigate the presence of "subversive persons" in New Hampshire and therefore that commitment for civil contempt was no longer permissible. A motion to dismiss on that ground was argued and denied, an exception being noted. As a second and separate point evidence was offered and argument made concerning the duration of the sentence. It was during the presentation of this point that the statement, now claimed to be a waiver, was made. Whether imprisonment for civil contempt can constitutionally be imposed in light of the statutory changes affecting the "area of interest" of the legislature, *Uphaus* v. *Wyman*, *supra*, at 78, and the Attorney General's powers is a question which never has been waived. It is earnestly pressed. Moreover, if there is now no basis for civil contempt, is criminal contempt constitutionally available? These are

substantial questions never resolved as far as I know in any our our prior decisions.

Second. Recently when Alabama asked the National Association for the Advancement of Colored People to disclose its membership list, we held that disclosure was not required because if compelled it might well abridge the rights of members to engage in lawful association in support of their common beliefs. We said in *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 462:

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn.* v. *Douds*, 339 U. S. 382, at 402; 'A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. Cf. *United States* v. *Rumely*, 345 U. S. 41, at 56–58 (concurring opinion)."

What we there said was not designed, as I understood it, as a rule for Negroes only. The Constitution favors no racial group, no political or social group. The group,

with which Dr. Uphaus was associated and whose membership list he refused to disclose, is entitled under the First Amendment to the same protection as the N. A. A. C. P. No groundwork whatever was laid in any of the records before us that World Fellowship, Inc. was at any time engaged in any conduct that could be called unlawful.'

We had *N. A. A. C. P.* v. *Alabama*, *supra*, before us when the *Uphaus* case was decided. It involved rights of the organization itself to defy those who wanted its membership lists. Not until later, however, did we have the case where an *individual* who possessed membership lists challenged the right of government to demand their production. In *Bates* v. *Little Rock*, 361 U. S. 516, decided after we handed down our decision in the *Uphaus* case, we reversed a state conviction of custodians of the records of local branches of N. A. A. C. P. for refusing to disclose its membership lists to city officials. We said:

> "On this record it sufficiently appears that compulsory disclosure of the membership lists of the local branches of the National Association for the Advancement of Colored People would work a significant interference with the freedom of association of their members. There was substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm. There was also evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations and induced former members to withdraw. This repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names. *N. A. A. C. P.* v.

Alabama, 357 U. S., at 463. Thus, the threat of substantial government encroachment upon important and traditional aspects of individual freedom is neither speculative nor remote." *Id.*, 523–524.

Can there be any doubt that harassment of members of World Fellowship, Inc., in the climate prevailing among New Hampshire's law-enforcement officials will not likewise be severe?[3] Can there be any doubt that its members will be as closely pursued as might be members of N. A. A. C. P. in some communities? If either N. A. A. C. P. or World Fellowship were engaged in criminal activity, we would have a different problem. But neither is shown to be. World Fellowship, so far as this record shows, is as law-abiding as N. A. A. C. P. The members of one are entitled to the same freedom of speech, of press, of assembly, and of association as the members of the other. These rights extend even to Communists, as a unanimous Court held in *DeJonge* v. *Oregon*, 299 U. S. 353.[4]

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[3] The Attorney General of New Hampshire in the motion to dismiss in this case states, "Those who voluntarily and knowingly appear with, consult with, confer with, attend functions with and otherwise act in concert with Communists or former Communists in America cannot possibly have any reasonable right to privacy in regard to such activities . . . ."

[4] Chief Justice Hughes wrote for the Court in that case:

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

"It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political

What is an unconstitutional invasion of freedom of association in Alabama or in Arkansas should be unconstitutional in New Hampshire. All groups—white or colored—engaged in lawful conduct are entitled to the same protection against harassment as the N. A. A. C. P. enjoys. Since we allowed in the *Bates* case the protection we deny here and since *Bates* was decided after we decided Uphaus' case, we should reconsider our earlier decision in this case. The *Bates* case and the *Uphaus* case put into focus for the first time the responsibility of an *individual* to make disclosure of membership lists. We cannot administer justice with an even hand if we allow Bates to go free and Uphaus to languish in prison.

For these reasons, as well as those advanced by MR. JUSTICE BLACK which I wholly share, I would note probable jurisdiction of this appeal. And Dr. Uphaus should, of course, be released on bail pending resolution of the questions by the Court.

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action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." 299 U. S., at 365.